No. 17-6086	
Title:	Herman Avery Gundy, Petitioner v. United States
Docketed:	September 22, 2017
Lower Ct:	United States Court of Appeals for the Second Circuit
Case Numbers:	(16-1829)
Decision Date:	June 22, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Sep 20 2017	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due October 23, 2017)
Sep 29 2017	Waiver of right of respondents United States to respond filed.
Oct 05 2017	DISTRIBUTED for Conference of 10/27/2017.
Oct 17 2017	Response Requested. (Due November 16, 2017)
Nov 09 2017	Order extending time to file response to petition to and including December 18, 2017.
Dec 18 2017	Brief of respondent United States in opposition filed. Certificate of Word Count Main Document
Jan 04 2018	DISTRIBUTED for Conference of 1/19/2018.
Jan 16 2018	Rescheduled.
Feb 05 2018	DISTRIBUTED for Conference of 2/16/2018.
Feb 20 2018	DISTRIBUTED for Conference of 2/23/2018.
Feb 26 2018	DISTRIBUTED for Conference of 3/2/2018.

Mar 05 2018	Motion of petitioner for leave to proceed in forma pauperis GRANTED. The petition for a writ of certiorari is GRANTED limited to Question 4 presented by the petition.
Mar 13 2018	Motion for an extension of time filed. **Main Document**
Mar 14 2018	Motion to extend the briefing schedule on the merits is granted . The time to file the joint appendix and petitioner's brief on the merits is extended to and including May 25, 2018. The time to file respondent's brief on the merits is extended to and including August 2, 2018.
May 24 2018	Brief amici curiae of Cato Institute & Cause of Action Institute filed. **Certificate of Word Count** **Proof of Service** **Main Document**
May 25 2018	Brief of petitioner Herman Gundy filed. **Main Document** **Certificate of Word Count** **Proof of Service**
May 25 2018	Joint appendix filed. (Statement of costs filed) **Main Document** **Proof of Service**
May 30 2018	Brief amici curiae of Competitive Enterprise Institute, Reason Foundation, Cascade Policy Institute filed. **Main Document** **Certificate of Word Count** **Proof of Service**
May 30 2018	Brief amicus curiae of The National Association of Federal Defenders filed. **Main Document** **Certificate of Word Count** **Proof of Service**
May 31 2018	Brief amicus curiae of Pacific Legal Foundation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 01 2018	Brief amicus curiae of New Civil Liberties Alliance filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 01 2018	Brief amicus curiae of Center for Constitutional Jurisprudence filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 01 2018	Brief amici curiae of William D. Araiza and 14 Other Constitutional, Criminal and Administrative Law Professors filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 01 2018	Brief amicus curiae of American Civil Liberties Union filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Jun 01 2018	Brief amici curiae of Scholars Whose Work Includes Sex Offense Studies filed.

	Main Document **Proof of Service** **Certificate of Word Count**
Jun 01 2018	Brief amicus curiae of Institute for Justice filed. **Main Document** **Main Document** **Main Document**
Jun 01 2018	Amicus brief of The Becket Fund for Religious Liberty not accepted for filing. (A corrected brief has been submitted - June 1, 2018)
Jun 01 2018	Brief amici curiae of Downsize DC Foundation, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 01 2018	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 01 2018	Brief amicus curiae of The Becket Fund for Religious Liberty filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 09 2018	SET FOR ARGUMENT On Tuesday, October 2, 2018
Aug 02 2018	Brief of respondent United States filed. (Distributed) **Proof of Service** **Main Document**
Aug 03 2018	CIRCULATED
Aug 07 2018	Record requested from the U.S.C.A. 2nd Circuit.
Aug 08 2018	Record received from the U.S.C.A. 2nd Circuit. The record is electronic.
Sep 04 2018	Reply of petitioner Herman Gundy filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
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No. 17-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

HERMAN AVERY GUNDY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether convicted sex offenders are "required to register" under the federal Sex Offender Notification and Registration Act ("SORNA") while in custody, regardless of how long they have until release.

(2) Whether all offenders convicted of a qualifying sex offense prior to SORNA's enactment are "required to register" under SORNA no later than August 1, 2008.

(3) Whether a defendant violates 18 U.S.C. § 2250(a), which requires interstate travel, where his only movement between states occurs while he is in the custody of the Federal Bureau of Prisons and serving a prison sentence.

(4) Whether SORNA's delegation of authority to the Attorney General to issue regulations under 42 U.S.C. § 16913(d) violates the nondelegation doctrine.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Herman Avery Gundy respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit Court of Appeals issued two opinions. One is reported at 804 F.3d 140. The other opinion is an unpublished summary order, but appears at 2017 WL 2703578 and Pet. App. 1.

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. § 3231 and entered judgment on June 16, 2016. The Second Circuit had jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291 and entered judgment on June 22, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant Constitutional provision is U.S. Const. Art. I § 1, which states that "All legislative Powers herein granted shall be vested in a Congress …."

The relevant statutory provisions are codified at 18 U.S.C. § 2250(a) and 42 U.S.C. § 16901 *et seq.*, particularly 42 U.S.C. § 16913.[1]

Title 18 U.S.C. § 2250(a) provides, in relevant part,

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[1] 42 U.S.C. § 16913 was subsequently transferred to 34 U.S.C. § 20913.

(a) In general. – Whoever –

(1) is required to register under the Sex Offender Registration and Notification Act; . . .

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

Title 42 U.S.C. § 16913 provides:

(a) In general. A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration. The sex offender shall initially register--

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current. A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) Initial registration of sex offenders unable to comply with subsection (b) of this section. The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.

(e) State penalty for failure to comply. Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

STATEMENT OF THE CASE

Petitioner was charged by indictment in the Southern District of New York on January 13, 2013 with one count of violating 18 U.S.C. § 2250(a) for traveling in interstate commerce and thereafter failing to register as required by the Sex Offender Registration and Notification Act (SORNA). He was convicted following a bench trial and sentenced to time served and five years of supervised release.

Petitioner was convicted of the state sex offense that creates his registration obligation on October 3, 2005. That day, he entered an *Alford* plea to Sexual Offense in the Second Degree, in violation of Maryland Criminal Law § 3-306. He was sentenced to 20 years in prison, with ten years suspended, and five years of probation.

At the time of this conviction, Petitioner was under federal supervised release following a 1994 federal drug conviction in the Eastern District of Pennsylvania. The Maryland state conviction triggered a violation of this federal supervised release, for which he was sentenced to 24 months' prison, to be served consecutively.

In 2011, Petitioner completed the carceral portion of his Maryland sentence and was deemed paroled by state authorities. He remained in physical custody in Maryland, however, now under the jurisdiction of the Federal Bureau of Prisons ("BOP") for service of his consecutive federal violation sentence. The BOP designated Petitioner to FCI Schuylkill to serve that sentence. In July 2011, he was physically transported from Maryland to FCI Schuylkill, which is in Pennsylvania.

After Petitioner was moved to Pennsylvania, the BOP determined that he could serve the final portion of his sentence in a community corrections facility, or halfway house, in New

York. The BOP ordered Petitioner's transfer via "unescorted commitment[]" to the Bronx Residential Re-Entry Center (RRC) located in New York. During an approximately eight-hour furlough on July 17, 2012, Petitioner transferred from FCI Schuylkill to the Bronx RRC. Petitioner was "in the custody of the BOP" at the time he moved between Pennsylvania and New York.

Petitioner remained at the Bronx RRC until August 27, 2012, when he was released from custody. He was approved for release to an address in the Bronx. Following his release from BOP custody, Petitioner lived in New York and did not travel between states.

Petitioner was arrested in the Bronx, New York on October 24, 2012 and ultimately charged with a violation of 18 U.S.C. § 2250(a). The indictment against him charged that, from in or about August 2012 through October 2012, being an individual required to register under SORNA, he traveled from Pennsylvania to New York and thereafter resided in New York without registering as a sex offender in New York.

In the district court, Petitioner moved to dismiss the indictment for failure to state an offense under § 2250(a). He recognized that he could be subject to state criminal penalties for failing to register as required, but argued that he was not subject to liability under § 2250(a) because his only interstate movement occurred while he was in BOP custody with at least thirty days remaining on his sentence – meaning he was not yet "required to register" under SORNA at the time of this movement. Petitioner further asserted that the indictment should be dismissed because criminal liability under § 2250(a) could not be based on custodial movement between states. He additionally raised several constitutional challenges to SORNA.

On May 22, 2013, the district court granted Petitioner's motion to dismiss, finding that he was not "required to register" within the meaning of § 2250(a)(1) at the time of his alleged interstate travel. The district court declined to reach his other arguments for dismissal. The government moved for reconsideration of this dismissal, which was denied. The government then appealed the dismissal.

On September 14, 2015, the Second Circuit reinstated the indictment against Petitioner. *See United States v. Gundy*, 804 F.3d 140 (2d Cir. 2015). In brief, the Circuit concluded that Petitioner was "required to register" within the meaning of 18 U.S.C. § 2250(a)(1) before his interstate movement, and therefore that the indictment should not have been dismissed. The court held that Petitioner was required to register no later than August 1, 2008, when the Attorney General applied SORNA to pre-Act offenders. The Circuit declined to reach additional arguments offered by Petitioner in support of dismissal.

Following remand to the district court, Petitioner renewed his motion to dismiss the indictment based on arguments not previously addressed by the district or circuit court. Specifically, Petitioner renewed his arguments that (i) he could not be liable for a violation of § 2250(a) because his only alleged interstate travel was while he was in the custody of the BOP; and (ii) SORNA improperly delegates legislative authority to the Attorney General, in violation of the Nondelegation Doctrine.

The district court rejected Petitioner's renewed motions to dismiss. Petitioner and the government agreed to conduct a bench trial on stipulated facts and agreed, *inter alia*, that Petitioner's only interstate movement occurred while he was in federal BOP custody.

On March 28, 2016, the district court conducted the bench trial and found Petitioner guilty of violating 18 U.S.C. § 2250(a). The court sentenced Petitioner to time served and five years of supervised release. The final amended judgment was entered on June 16, 2016.

Petitioner appealed his conviction to the Second Circuit. On June 22, 2017, the Circuit issued an unpublished summary order upholding Petitioner's conviction. The Circuit concluded that his interstate movement was sufficiently voluntary to satisfy the travel requirement of § 2250(a), assuming without deciding that the statute requires voluntary travel.

REASONS FOR GRANTING THE PETITION

In *Carr v. United States*, this Court held that 18 U.S.C. § 2250(a) has three elements that must be satisfied in sequence. The government must prove, first, that the defendant is "required to register under" SORNA; second, that he then "travels in interstate or foreign commerce"; and, finally that he thereafter "knowingly fails to register or update a registration as required by" SORNA.

In the prototypical § 2250 prosecution, a defendant resides out of custody in State A and is required to register in that state as a sex offender. He then travels to State B and fails to register. Here, however, the Second Circuit sanctioned prosecution of a defendant whose only travel between states occurred while he was in custody serving a sentence, and who remained continuously in one state following his release from custody. In doing so, the Second Circuit erroneously interpreted § 2250(a) to require sex offenders to participate in SORNA's community registration program while in prison. This is an interpretation that has not been endorsed by any other circuit; which conflicts with the Attorney General's interpretative Guidelines; and which is not consistent with the purposes of SORNA. It also conflicts with

the reasoning of this Court's decisions in *Carr v. United States* and *Reynolds v. United States*, and disturbs the traditional state-federal enforcement balance that SORNA sought to maintain, improperly subjecting to federal prosecution individuals who reside continuously in one state following their release from custody. The decision also imposes a significant and unnecessary burden on states to the extent that it holds SORNA requires registration of state offenders while they are in jail and prison.

In addition, the Second Circuit erroneously concluded that a custodial prison transfer can constitute "travel," an essential conduct element of a § 2250 offense. The Circuit also declined to hold that this essential conduct element required voluntary action. These decisions run afoul of the fundamental requirement that criminal liability be predicated on voluntary conduct. They are also an incorrect reading of the text of § 2250(a), inconsistent with the statutory context, intent and history.

Finally, this Court should take the opportunity to address a frequently recurring question in SORNA cases, which impacts hundreds of thousands of individuals – the question of whether Congress properly delegated to the Attorney General the question of whether SORNA's registration requirements should apply to offenders convicted prior to SORNA's enactment. The Court should rule that this was not a proper delegation of legislative authority.

ARGUMENT

SORNA Does Not Require Sex Offenders to Register While in Custody

Section 2250(a) of Title 18 subjects to federal prosecution anyone who is (i) "required to register under" SORNA; (ii) thereafter travels in interstate commerce; (iii) and knowingly fails to register or update a registry as required by SORNA. *See Carr*, 560 U.S. at 445-46. The

three elements must be met sequentially. *Id.* The dispute in this case relates to what satisfies § 2250(a)(1) and starts the sequence.

The Second Circuit held that individuals like Petitioner, who were convicted of a qualifying sex offense before SORNA was enacted, are "required to register" as of August 1, 2008 (the date that the Circuit finds that the Attorney General effectively applied SORNA to such pre-Act offenders). In other words, the Circuit held that sex offenders are legally required to participate in community sex offender registration programs while in prison, regardless of how many months or years they have remaining on their sentence. This interpretation of § 2250(a) has not been endorsed by any other Circuit and is not consistent with the statutory text, the Attorney General's interpretative Guidelines, or the legislative intent of SORNA.

In *Carr v. United States*, this Court held that conviction for a qualifying sex offense is *not* the event that triggers the start of § 2250(a)'s sequence. *See* 560 U.S. at 446-47, n.4. Instead the sequence is triggered when an individual is "required to register under" SORNA, as the text plainly states. *Id.* As a result, if an individual's only interstate travel occurs before he is required to register under SORNA, there is no violation of 18 U.S.C. § 2250. *See id.*; *see also Reynolds v. United States*, 132 S. Ct. 975, 980 (2012).

In both *Carr* and *Reynolds*, the defendant's interstate travel occurred either before SORNA was enacted or before the Attorney General validly applied SORNA to pre-Act sex offenders. Either way, the individual could not have been "required to register" under SORNA at the time of his interstate travel and therefore was not liable under § 2250(a). However, in those decisions this Court did not further detail when the first element is met.

The question of what starts this sequence and satisfies the first element of § 2250(a) was the focus of Petitioner's initial motion to dismiss and appeal. The most natural reading of the text is that the sequence starts when a person is required to register under SORNA, meaning that he is presently, actually required to register as a sex offender under federal law. Under this reading, § 2250(a)(1) incorporates by reference the various provisions of SORNA, 42 U.S.C §§ 16901 *et seq.*, detailing who is required to register, when someone must register, and what registration entails. *See United States v. Robbins*, 729 F.3d 131, 134 (2d Cir. 2013).

Reading § 2250 to incorporate the other statutory provisions of SORNA is the only way to identify who may be criminally liable under the statute, to give content to the phrase "to register," and to detail what an individual must do to avoid criminal liability. As the Circuits have recoginized, "§ 16913 and § 2250(a) have to be considered in tandem, because the former gives the latter substance." *Robbins*, 729 F.3d at 134; *see also United States v. Guzman*, 591 F.3d 83, 90 (2d Cir. 2010) (stating that § 16913 gives § 2250 substance); *United States v. Sanders*, 622 F.3d 779, 783 (7th Cir. 2010) (explaining that § 2250 attaches criminal penalties for those who fail to comply with registration requirements of § 16913 and travel interstate, and that the two statutes are "inextricably intertwined"). Thus, 42 U.S.C. § 16913 dictates when an offender is "required to register under" SORNA, as that phrase is used in § 2250(a).

Section 16913 contemplates three categories of individuals who may be required to register under SORNA: (i) future offenders who will be convicted of a qualifying sex offense and sentenced to prison, *see* 42 U.S.C. § 16913(b)(1); (ii) future offenders who will be convicted but not sentenced to prison, *see* § 16913(b)(2); and (iii) offenders (like Petitioner) convicted of a sex offense before SORNA's enactment, who might be in or out of custody, *see* § 16913(d).

Future offenders sentenced to prison must register "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement." 42 U.S.C. § 16913(b)(1); *see also* 42 U.S.C. § 16917(a) (requiring "appropriate official" to notify offenders of duty to register "shortly before release of the sex offender from custody"). Future offenders who are not sentenced to prison must register "not later than 3 business days after being sentenced for that offense." 42 U.S.C. § 16913(b)(2). The Attorney General determines registration requirements for pre-Act offenders or those in jurisdictions which have not implemented SORNA, and has stated that they should register as required by §16913. *See* 42 U.S.C. § 16913(d); 73 Fed. Reg. 38,063.

Both §§ 16913 and 16917 are specifically keyed to an individual's custodial status: individuals are not required to register upon conviction for a qualifying sex offense, or even immediately following sentencing if they are in custody. Instead, they are informed of their duty to register and must register within a certain timeframe pegged to when they will be free in the community. This comports with another provision of SORNA, 42 U.S.C. § 16915, which specifically states that offenders need not register while in custody. 42 U.S.C. § 16915(a) ("sex offender shall keep the registration current for the full registration period (excluding any time the sex offender is in custody or civilly committed)").

The Attorney General's Guidelines support this plain reading of the text. The Attorney General dictates the registration obligations of pre-Act offenders. These Guidelines are also essential to "eliminate the very kind of vagueness and uncertainty that criminal law must seek to avoid." *Reynolds*, 132 S. Ct. at 982.

Like the text of SORNA itself, the Attorney General's Guidelines tie an individual's duty to register under SORNA to his custodial status and do not require registration by pre-Act incarcerated offenders until shortly before release from custody. The Guidelines explain that pre-Act offenders in prison at the time of SORNA's implementation are required to register within the "normal SORNA time frame," which means shortly before release from prison. 73 Fed. Reg. 38,063-64. The Attorney General further states:

> "Shortly" does not prescribe a specific time frame, but jurisdictions should implement this requirement in light of the underlying objectives of ensuring that sex offenders have their registration obligations in mind when they are released, and avoiding situations in which registration information changes significantly between the time the initial registration procedures are carried out and the time the offender is released.

73 Fed. Reg. 38,063.[2]

Similarly, if a pre-Act offender completed his prison term for the sex offense, but is in custody for a different offense, the registration process is the same – he should register when released from imprisonment:

> the normal SORNA initial registration procedures and timing requirements will apply, but with the new offense substituting for the predicate registration offense as the basis for the time frame. In other words, such a sex offender must be initially registered in the manner specified in SORNA § 117(a) prior to release from imprisonment for the new offense that brought him back into the system . . . .

73 Fed. Reg. 38,063. This link between registration requirements and an individual's custodial status accords with the Guidelines' repeated recognition that registries are aimed at offenders

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[2] This timing is consistent with Federal Bureau of Prisons regulations which require registration "at least 5 days prior to release," but not earlier. 18 U.S.C. § 4042(c)(2); *see also* BOP Program Statement 5141.02 at 11. Inmates like Petitioner who are transferred to a pre-release community based program, or halfway house, must complete registration while at the halfway house. *See* BOP Program Statement 5141.02 at 8.

in the community. *See* 73 Fed. Reg. 38,044 ("In their most basic character, the registration aspects of these programs are systems for tracking sex offenders following their release into the community."); 73 Fed. Reg. 38,046 ("registration requirements generally come into play when sex offenders are released from imprisonment").

Considering SORNA's various statutory provisions together, and reading them in light of the Attorney General's Guidelines, sex offenders in prison, as Petitioner was in 2008, should not be "required to register" for purposes of 18 U.S.C. § 2250(a)(1) until shortly before the end of their sentence of imprisonment.

Under the specific facts of Petitioner's case, therefore, he was not required to register until August 2012, shortly before his release from custody. Because all of his interstate movement following his 2005 sex offense conviction occurred before August 2012, while he was still in custody with at least thirty days remaining on his prison sentence, Petitioner should not be guilty of a violation of 18 U.S.C. § 2250(a).

Rather than adopting this reading of § 2250(a), the Second Circuit held that all pre-Act offenders are required to register no later than August 1, 2008, regardless of their custodial status. For the reasons detailed above, this holding is not consistent with the text of the statute. It also contradicts the reasoning of this Court in *Carr* and the Attorney General's Guidelines.

Further, the Second Circuit's decision is difficult to square with the legislative goals of SORNA. There are two overriding statutory purposes ignored by the Second Circuit's reading of SORNA: Congress's aim of monitoring sex offenders in the community, to protect the public, and Congress's goal of maintaining the preexisting state-federal balance, whereby states retain primary responsibility for registering and supervising state sex offenders.

SORNA's focus on offenders in the community runs throughout the law. 42 U.S.C. § 16915(a) specifically excludes from the registration period "any time the sex offender is in custody or civilly committed." Offenders in custody are not notified of their registration obligations until "shortly" before release. 42 U.S.C. § 16917(a). Section 16913 requires registration in each place an individual resides, works, or is a student, plainly contemplating a person out of prison who might live, work and study in different places. Offenders are periodically required to report in person, which would be impossible during incarceration. *See* 42 U.S.C. §§ 16913, 16916. These provisions uniformly evince the Congressional presupposition that offenders will be out of custody when participating in these registries.

Sex offender registration schemes like SORNA focus on offenders who are out of custody for an obvious reason: there is no need to establish an elaborate set of registration rules to monitor offenders in custody, because they are already thoroughly monitored and restricted by the fact of being incarcerated. As the Attorney General's Guidelines state, registration requirements

> generally presuppose the case of a sex offender who is free in the community. Where a sex offender is confined, the public is protected against the risk of his reoffending in a more direct way, and more certain means are available for tracking his whereabouts.

73 Fed. Reg. 38,068. From a state's standpoint, requiring incarcerated individuals to participate in its community sex offender registry program is entirely unnecessary and burdensome.

The Second Circuit's interpretation of § 2250(a) also disrupts the traditional state-federal balance that Congress sought to preserve in enacting SORNA. There is no federal police power and it is not clear what, if any, authority the federal government would have over state sex offenders who reside continuously in one state. *See United States v. Kebodeaux*, 133 S.

Ct. 2496, 2507 (2013) (Roberts, J., concurring). States have always maintained primary responsibility for registering and monitoring state sex offenders, like Petitioner. SORNA should not be read to disrupt this balance by imposing federal criminal liability on state sex offenders who reside continuously in one state following their release from custody, especially since there is no obvious federal interest in such a case.

POINT II

Liability for a Violation of 18 U.S.C. § 2250(a) Should Not Be Predicated on Involuntary or Custodial Movement

The Second Circuit also erroneously concluded that a custodial prison transfer could constitute "travel" within the meaning of § 2250(a) and declined to require proof of voluntary conduct to satisfy this element, in contravention of fundamental precepts of criminal law.

The second element of 18 U.S.C. § 2250(a) – interstate travel – is, in the words of this Court, "the very conduct at which Congress took aim" in enacting the law. *Carr*, 560 U.S. at 454. Interstate travel is a critical component of the actus reus of the federal crime and a specific aspect of "the harm Congress sought to punish." *Id.*

Because interstate travel is an essential component of a violation of § 2250(a), the question becomes what "travel" means in this context. Considering the statutory text and legislative history of SORNA, and background principles of criminal law, Petitioner argued that the Second Circuit should find that the requisite travel must be noncustodial and voluntary. However, the Circuit held that a custodial prison transfer could constitute "travel" and declined to hold that any travel must be voluntary. Both conclusions were wrong.

SORNA does not define the term "travels," as used in 18 U.S.C. § 2250(a)(2)(B). To interpret statutory provisions, this Court begins with the words' ordinary meaning. *See Smith*

v. United States, 508 U.S. 223, 228 (1993). At the same time, it considers the context, including surrounding provisions and the structure, history and purpose of the statute. *See, e.g., Abramski v. United States*, 135 S. St. 2259, 2267 (2014). "Statutory language 'cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (quoting *Roberts v. Sea-Land Services, Inc.*, 132 S. Ct. 1350 (2012)); *see also Yates v. United States*, 135 S. Ct. 1074, 1084-85 (2015); *Johnson v. United States*, 559 U.S. 133, 139 (2010).

These general rules of statutory construction have been repeatedly applied to SORNA, whose provisions must be interpreted with reference to one another and the statutory scheme as a whole. *See, e.g., United States v. Robbins*, 729 F.3d 131, 134 (2d Cir. 2013); *United States v. Alexander*, 802 F.3d 1134, 1140 (10th Cir. 2015).

In interpreting § 2250(a), this Court should be guided by its recent decisions reading statutory words with a view towards their overall context. In *Yates v. United States*, for example, this Court held that a commercial fisherman could not be liable under a provision of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1519, for disposing of illegally harvested fish to conceal that they had been caught. Section 1519 criminalizes altering, destroying, mutilating, or concealing any "tangible object," and the Court conceded that a fish was literally a tangible object. 135 S. Ct. at 1079. Nonetheless, based on the statutory context, the Court limited the definition of "tangible object" to one that is used to record or preserve information, and rejected liability for the fisherman. *Id.* at 1079, 1083.

Just as in *Yates*, this Court should find that meaning of "travels" is informed and limited by its statutory context: when § 2250(a) criminalizes "travel[] in interstate or foreign commerce," the overall statutory scheme makes clear that this means community, not custodial, travel. SORNA's focus on sex offenders who have been released from custody and are at large in the community runs throughout the statutory text and legislative history, as described above. The law clearly targets offenders in the community, not in custody.

Considering this context and background, it is clear that § 2250(a)'s interstate travel requirement was not intended to be met by the custodial movement of prisoners like Petitioner. Instead, when that provision of SORNA references travel, it is intended to apply only to the travel of individuals who have already been released into the community – not to those completing an interstate prison transfer.

Even apart from the statutory text and intent of SORNA, this Court should find that custodial movement cannot give rise to criminal liability because such movement is not truly voluntary. With extremely limited exceptions, criminal liability must be premised on voluntary action. The requirement of voluntary action is one of the basic principles of criminal common law, the background against which Congress legislates. *See United States v. Nucci*, 364 F.3d 419, 423 (2d Cir. 2004). As a result, courts routinely read voluntariness requirements into federal criminal statutes even if they are not stated explicitly. *See, e.g.*, *United States v. Rodriguez*, 416 F.3d 123, 125 (2d Cir. 2005) (requiring voluntary reentry attempt under 8 U.S.C. § 1326, though term "voluntary" is not in statute); *United States v. Gaines*, 295 F.3d 293, 302 (2d Cir. 2002) (interpreting 18 U.S.C. § 922(g)(1) to require voluntary possession of a firearm). Courts have read such a voluntariness requirement into statutes that require interstate travel or the use of

interstate facilities. *See, e.g., United States v. Gibson Specialty Co.*, 507 F.2d 446, 449 (9th Cir. 1974) (stating that Travel Act requires proof of the voluntary use of interstate facilities); *United States v. Gebhart*, 441 F.2d 1261, 1263 (6th Cir. 1971) (requiring proof of voluntary travel in interstate commerce or the voluntary use of the facilities of interstate commerce).

Considering this fundamental tenet of criminal law, a critical component of the conduct comprising a § 2250(a) violation – interstate travel – must be voluntary, and the Second Circuit was wrong to decline to impose such a requirement.

POINT III

SORNA Improperly Delegates Legislative Authority to the Attorney General

Finally, the Court should find that the application of SORNA's registration requirements to offenders such as Petitioner, who were convicted of a sex offense prior to SORNA's enactment, violated the Nondelegation Doctrine.

Congress did not determine SORNA's applicability to individuals convicted of a sex offense prior to its enactment. Instead, 42 U.S.C. § 16913(d) delegated to the Attorney General the "authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act . . . ."

The authority to legislate is entrusted solely to Congress. U.S. Const. Art. I §§ 1, 8. "Congress manifestly is not permitted to abdicate or transfer to others the legislative functions" with which it is vested. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). This "nondelegation doctrine is rooted in the principle of separation of powers . . . ." *Mistretta v. United States*, 488 U.S. 361, 371 (1989).

While the Nondelegation Doctrine does not prevent Congress from "obtaining the assistance of its coordinate Branches," it can do so only if it provides clear guidance. *Id.* at 372-73. "So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not forbidden delegation of legislative power.'" *Id.* at 372 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928)).

In both *Panama Refining Co.* and *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), this Court held that Congress had unconstitutionally authorized the Executive to make laws because it "had failed to articulate any policy or standard that would serve to confine the discretion of the authorities to whom [it] delegated power." *Mistretta*, 488 U.S. at 374, n.7.

Similarly, in SORNA Congress failed to articulate any policy to guide the Attorney General in determining the law's applicability to pre-Act offenders. Congress gave no guidance as to how the Attorney General should exercise this delegated authority. Because of this lack of an intelligible principle, jurists have repeatedly questioned whether Congress could constitutionally make this delegation. For example, in his dissenting opinion in *Reynolds v. United States*, Justice Scalia questioned whether Congress could constitutionally take such action, noting this "sail[s] close to the wind with regard to the principle that legislative powers are nondelegable." 132 S. Ct. 975, 986 (2012); *see also United States v. Fuller*, 627 F.3d 499, 509 (2d Cir. 2010) (Raggi, J., concurring), *vacated on other grounds by Fuller v. United States*, 132 S. Ct. 1534 (2012); *United States v. Hinckley*, 550 F.3d 926, 948 (10th Cir. 2008) (Gorsuch, concurring), *abrogated on other grounds by Reynolds v. United States*, 132 S. Ct. 975 (2012).

Because SORNA grants the Attorney General unfettered discretion to determine who is subject to criminal legislation without an "intelligible principle" to guide this discretion, it violates the nondelegation doctrine.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
September 20, 2017

Respectfully submitted,
Federal Defenders of New York, Inc.

By: _____

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16-1829
United States v. Gundy

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of June, two thousand seventeen.

PRESENT:

RICHARD C. WESLEY,
SUSAN L. CARNEY,
CHRISTOPHER F. DRONEY,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. No. 16-1829

HERMAN AVERY GUNDY, AKA HERMAN GRUNDY,

Defendant-Appellant.

FOR APPELLANT: SARAH BAUMGARTEL, Federal Defenders of New York, Inc., New York, NY.

FOR APPELLEE: EMIL J. BOVE III (Brendan F. Quigley, Brian R. Blais, *on the brief*), Assistant United

States Attorneys, *for* Preet Bharara, United States Attorney for the Southern District of New York, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Oetken, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the June 16, 2016 judgment of the District Court is **AFFIRMED**.

Defendant-appellant Herman Gundy appeals his conviction and sentence, following a bench trial on stipulated facts, for one count of failing to register as a sex offender after traveling in interstate commerce, in violation of the Sex Offender Registration and Notification Act ("SORNA"), 18 U.S.C. § 2250(a). We assume the parties' familiarity with the underlying facts and the procedural history of the case, to which we refer only as necessary to explain our decision to affirm.

While serving a federal sentence for violating Maryland Criminal Law § 3-306, Sexual Offense in the Second Degree, during his supervised release for a prior federal offense, Gundy was transferred from Maryland to a federal prison in Pennsylvania. *See United States v. Gundy*, 804 F.3d 140, 143 (2d Cir. 2015). As he approached the end of his federal sentence, Gundy authorized the Department of Justice to make arrangements for his move to community-based custody. He was ordered to be transferred to the Bronx Residential Re-Entry Center, a halfway house in New York, and he was granted a furlough to travel unescorted on a commercial bus on July 17, 2012, from Pennsylvania to the Bronx. Gundy arrived at the Re-Entry Center as planned, and, on August 27, 2012, was released from federal custody there to a private residence in the Bronx. Gundy did not register as a sex offender in either Maryland or New York, as state law required, and was arrested and charged under 18 U.S.C. § 2250. *Id.* at 144. After the District Court granted Gundy's motion to dismiss the prosecution for the absence of a trigger for SORNA's registration requirement, this Court reversed the dismissal and

reinstated the indictment, holding that the requirement was triggered because Gundy was "required to register" under SORNA no later than August 1, 2008. *See id.* at 145.

Upon the indictment's reinstatement, Gundy renewed his motion to dismiss on the basis that the interstate travel requirement of the statute was not satisfied because he was still in custody when he traveled from Pennsylvania to the Bronx. The District Court denied the motion, holding that the statute did not include an exception to the interstate travel element based on a defendant's custodial status. The District Court also held that, even if the statute did include a voluntariness or *mens rea* requirement, the allegations of the indictment were sufficient for that issue to be resolved at trial.

A bench trial followed on stipulated facts. The District Court found that each element of the offense had been proven beyond a reasonable doubt, including the interstate travel element and any voluntariness or *mens rea* requirement that may apply, and thus found Gundy guilty of violating § 2250. Following a sentencing hearing, the District Court entered judgment imposing a sentence of time served and a five-year term of supervised release. Gundy now appeals from that judgment.

Section 2250(a) imposes criminal liability on anyone who (1) is required to register under SORNA; (2) travels in interstate or foreign commerce; and (3) knowingly fails to register or update a required registration. 18 U.S.C. § 2250(a). We held in our consideration of Gundy's earlier appeal that Gundy satisfies the first requirement. There is no dispute that he knowingly failed to register, thus satisfying the third requirement. On appeal, Gundy asks us to read in an exception to the second requirement, travel in interstate commerce, for a defendant who crosses state lines while in federal custody. He contends that holding otherwise would violate the usual requirement of criminal law that criminal acts be committed voluntarily. The parties also dispute whether, on the stipulated facts and conclusions of the District Court following the bench trial, Gundy's travel from Pennsylvania to New York was voluntary.

We decline to reach Gundy's argument regarding the interpretation of § 2250(a).[1] Assuming *arguendo* that Gundy is correct and that the travel element contains an implicit voluntariness requirement, that requirement is easily met on the facts of this case. Although Gundy remained technically in federal custody when traveling to the halfway house in New York, the stipulated facts at trial are sufficient to support the District Court's finding that Gundy's travel was voluntary. On the basis of those facts, the District Court was free to conclude that Gundy made the trip in question willingly, as he authorized the initial transfer process and then traveled by bus to New York on his own recognizance. *See United States v. Pierce*, 224 F.3d 158, 164 (2d Cir. 2000) (noting that standard of review for sufficiency of the evidence is the same in a bench trial as a jury trial). We need not and do not reach the question of statutory interpretation because, even assuming Gundy is correct that interstate travel in § 2250(a) is limited to voluntary travel, the District Court reasonably found that the travel here was voluntary.

* * *

We have considered Gundy's remaining arguments and find them to be without merit.[2] Accordingly, we **AFFIRM** the judgment of the District Court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

[1] To the extent Gundy attempts to present his case as two separate arguments—one based on voluntariness, and one based on a lack of congressional "focus" on sex offenders in custody (supporting the creation of a *per se* custodial travel exemption)—we are unpersuaded. Gundy himself repeatedly blends these arguments, *see, e.g.*, Appellant's Br. 1, 11, and he provides us with no real reason to look to look past the statute's text to other expressions of congressional intent except for his stated concern about the voluntariness of custodial travel.

[2] This includes Gundy's argument—foreclosed by *United States v. Guzman*, 591 F.3d 83, 91-93 (2d Cir. 2010), and made only for preservation purposes—that SORNA violates antidelegation principles.

13-3679-cr
United States v. Gundy

United States Court of Appeals
FOR THE SECOND CIRCUIT

August Term, 2014

(Argued: October 28, 2014 Decided: September 14, 2015)

Docket No. 13-3679-cr

UNITED STATES OF AMERICA,

Appellant,

–v.–

HERMAN AVERY GUNDY, A/K/A HERMAN GRUNDY,

Defendant-Appellee.

B e f o r e :

KATZMANN, *Chief Judge*, HALL and CARNEY, *Circuit Judges*.

The United States appeals from orders of the United States District Court for the Southern District of New York (J. Paul Oetken, *Judge*) dismissing the January 7, 2013 Indictment against Defendant-Appellee Herman Avery Gundy and denying its motion for reconsideration of the dismissal. The federal Sex Offender Registration and Notification Act makes it a crime for a person who is

"required to register" under the Act to travel interstate and then knowingly fail to register or update his or her registration. 18 U.S.C. § 2250(a). The District Court dismissed the Indictment for failure to state an offense on the ground that the interstate travel charged in the Indictment occurred before Gundy was required to register. We hold that Gundy was a person "required to register" within the meaning of the Act from before the time of the charged interstate travel, and thus we REVERSE the District Court's order of dismissal. We REMAND the cause to the District Court for reinstatement of the Indictment and for further proceedings.

BRENDAN F. QUIGLEY, Assistant United States Attorney (Emil J. Bove III and Justin Anderson, Assistant United States Attorneys, *on the brief*), *for* Preet Bharara, United States Attorney for the Southern District of New York, New York, NY, *for Appellant*.

SARAH BAUMGARTEL (Yuanchung Lee, *on the brief*), Federal Defenders of New York, Inc., Appeals Bureau, New York, NY, *for Defendant-Appellee*.

SUSAN L. CARNEY, *Circuit Judge*:

The United States appeals from orders of the United States District Court for the Southern District of New York (J. Paul Oetken, *Judge*) dismissing the January 7, 2013 Indictment against Defendant-Appellee Herman Avery Gundy and denying its motion for reconsideration of the dismissal. The Indictment charged Gundy with a violation of the Sex Offender Registration and Notification Act ("SORNA" or the "Act"), which makes it a federal crime for a

person who (1) "is required to register under [SORNA]," and (2) "travels in interstate or foreign commerce," to then (3) "knowingly fail[] to register or update a registration as required by [SORNA]." 18 U.S.C. § 2250(a); *see Carr v. United States*, 560 U.S. 438, 446 (2010) (explaining that the elements must be satisfied in sequence). This case requires us to decide when a person is "required to register" within the meaning of SORNA. The District Court, reasoning that Gundy was not "required to register" until shortly before his release from custody and thus after the interstate travel charged in the Indictment, held that Gundy could not have violated § 2250(a). Because we disagree with the District Court's conclusion that Gundy was not "required to register" until after the charged interstate travel, we REVERSE the District Court's order dismissing the Indictment and REMAND the cause to the District Court for reinstatement of the Indictment and for further proceedings.

BACKGROUND

A. The Sex Offender Registration and Notification Act

The federal government has set national standards for sex offender registration and notification since 1994, when it first required states to adopt

registration laws as a condition for receiving federal law enforcement funds. *See* Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, § 170101, 108 Stat. 2038, 2038-42 (1994) (repealed 2006); *see also* Final Guidelines, 73 Fed. Reg. 38,030 (July 2, 2008). The Sex Offender Registration and Notification Act, which was enacted on July 27, 2006, *see* Pub. L. No. 109-248, 120 Stat. 590, was designed to improve the existing system by "mak[ing] more uniform what had," until that point, "remained a patchwork of federal and 50 individual state registration systems, with loopholes and deficiencies that had resulted in an estimated 100,000 sex offenders becoming missing or lost." *United States v. Kebodeaux*, 133 S. Ct. 2496, 2505 (2013) (citations and internal quotation marks omitted). Among other things, the Act created the National Sex Offender Registry, *see* 42 U.S.C. § 16919; imposed new guidelines on the states for the maintenance of registries, *see id.* §§ 16912, 16914; and imposed new registration requirements on offenders, *see id.* §§ 16913-16— while repealing much of the then-existing registration regime, *see id.* §§ 14071-73 (2006).

To promote offenders' compliance with the new registration requirements, SORNA made it a federal crime to fail to register or update one's registration as

required by the Act under certain circumstances. In relevant part, the criminal law provides as follows:

> (a) In general.—Whoever—
> (1) is required to register under [SORNA];
> (2) . . .
> (B) travels in interstate or foreign commerce . . . ; and
> (3) knowingly fails to register or update a registration as required by [SORNA];
> shall be fined under this title or imprisoned not more than 10 years, or both.

18 U.S.C. § 2250.[1]

The particular civil registration requirements upon which criminal liability under § 2250(a) depends are set out at 42 U.S.C. § 16913. *See Reynolds v. United States*, 132 S. Ct. 975, 978-79 (2012); *see also United States v. Guzman*, 591 F.3d 83, 90 (2d Cir. 2010) (explaining that, "without § 16913, § 2250 has no substance"

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[1] Section 2250(a) provides in full:

> (a) In general.—Whoever—
> (1) is required to register under the Sex Offender Registration and Notification Act;
> (2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
> (3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;
> shall be fined under this title or imprisoned not more than 10 years, or both.

(internal quotation marks omitted)). Subsection (a) of § 16913 contains the core registration mandate. It provides:

> A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

42 U.S.C. § 16913(a). Subsection (b) governs the timing of "Initial registration," stipulating that "[t]he sex offender shall initially register—(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or (2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment." *Id.* § 16913(b). Subsection (c) sets the terms under which a sex offender must update his or her registration, requiring a sex offender to report within three business days—in person and in at least one registration jurisdiction—any "change of name, residence, employment, or student status." *Id.* § 16913(c).

The duration of these registration requirements is specified in 42 U.S.C. § 16915: The "full registration period" is fifteen years for a statutorily defined "tier I" sex offender, twenty-five years for a "tier II" sex offender, and the life of

the offender for a "tier III" offender. 42 U.S.C. § 16915(a); *see also id.* § 16911(2)-(4) (defining tiers of sex offenders). The period of required registration is reduced for those offenders who maintain "clean record[s]" for a sufficient number of years. *Id.* § 16915(b).

Rather than determine by statute what retroactive application to give the registration requirements, Congress vested in the Attorney General "the authority to specify the applicability of the requirements of [SORNA] to sex offenders convicted before the enactment of [SORNA] or its implementation in a particular jurisdiction." 42 U.S.C. § 16913(d). Since SORNA's enactment, the Attorney General—in interim and final rules and proposed and final guidelines published between 2007 and 2010[2]—has specified that the Act's requirements apply to all sex offenders whose convictions predate the enactment of the Act, even in jurisdictions that have yet to implement it.[3] We have held that SORNA

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[2] *See* Interim Rule, 72 Fed. Reg. 8894, 8896 (Feb. 28, 2007) ("SORNA applies to all sex offenders (as the Act defines that term) regardless of when they were convicted."); Proposed Guidelines, 72 Fed. Reg. 30,210, 30,212 (May 30, 2007) ("SORNA's requirements apply to all sex offenders, including those whose convictions predate the enactment of the Act."); Final Guidelines, 73 Fed. Reg. 38,030, 38,063 (July 2, 2008) ("SORNA applies to all sex offenders, including those convicted of their registration offenses prior to the enactment of SORNA or prior to particular jurisdictions' incorporation of the SORNA requirements into their programs."); Final Rule, 75 Fed. Reg. 81,849, 81,850 (Dec. 29, 2010) (finalizing the interim rule "to eliminate any possible uncertainty or dispute concerning the scope of SORNA's application").

[3] SORNA does not require registration, however, by offenders who "have been in the

became applicable to pre-Act offenders at the latest when the Attorney General's final guidelines took effect. *See United States v. Lott*, 750 F.3d 214, 217 (2d Cir. 2014). This occurred on August 1, 2008, thirty days after the final guidelines were published. *See* 5 U.S.C. § 553(d) (providing that, subject to certain exceptions not applicable here, "[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date").[4]

B. Factual Basis for Gundy's Indictment

In October 2005, Herman Gundy was convicted of violating Maryland Criminal Law § 3-306, Sexual Offense in the Second Degree. He was sentenced to twenty years' imprisonment (with ten years suspended), to be followed by five years' probation. When he committed the offense that was the basis for his

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community for a greater amount of time than the registration period required by SORNA." 73 Fed. Reg. at 38,046-47.

[4] The guidelines themselves identify their "Effective Date" as July 2, 2008, the date they were published in the Federal Register. *See* 73 Fed. Reg. at 38,030. But 5 U.S.C. § 553(d) creates an exception to the thirty-day prior publication requirement only for "(1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretive rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule." None of these exceptions applies: The final guidelines do not grant or recognize an exemption or relieve a restriction. They are substantive, not interpretive, rules. *See Lott*, 750 F.3d at 217-19. And the Attorney General "provided no statement of reasons to establish 'good cause.'" *United States v. Utesch*, 596 F.3d 302, 311 n.8 (6th Cir. 2010). Indeed, in these proceedings, the government itself has conceded that the effective date of the final guidelines was August 1, 2008. *See* Appellant's Br. 20 n.4.

Maryland conviction, Gundy was already subject to the supervision of the United States District Court for the District of Maryland in relation to an earlier federal conviction. Committing the Maryland offense violated the terms of his federal supervised release. In March 2006, Gundy pleaded guilty to the supervised release violation and was sentenced to twenty-four months' imprisonment for that offense, to be served consecutively to the Maryland sentence.

About four and a half years later, in November 2010, Gundy was transferred from the custody of the State of Maryland to the custody of the Federal Bureau of Prisons to serve his federal sentence for violating his supervised release. But he remained in Maryland, apparently still in a state facility notwithstanding his federal custody.

Federal authorities eventually transferred Gundy to FCI Schuylkill in Minersville, Pennsylvania. In March 2012, toward the end of his federal sentence and in preparation for his release, Gundy signed a "Community Based Program Agreement" authorizing the Department of Justice to make arrangements for his transition into community-based custody. Three months later, Gundy was ordered to be transferred to the Bronx Residential Re-Entry Center, a halfway

house in New York. At his request, Gundy was granted a furlough to travel, unescorted, on July 17, 2012, from FCI Schuylkill to the Bronx. In his furlough application, Gundy acknowledged, among other things:

> I understand that if approved, I am authorized to be only in the area of the destination shown above and at ordinary stopovers or points on a direct route to or from that destination. I understand that my furlough only extends the limits of my confinement and that I remain in the custody of the Attorney General of the United States. If I fail to remain within the extended limits of this confinement, it shall be deemed as escape from the custody of the Attorney General . . . .

Ex. H to Decl. of Assistant U.S. Att'y Emil J. Bove III.

Gundy traveled from FCI Schuylkill to the Bronx Residential Re-Entry Center on July 17 as planned. On August 27, 2012, after completing his stay in the halfway house, Gundy was released from federal custody to a residence in the Bronx.

The government contends that, contrary to SORNA's requirements, Gundy registered in neither Maryland nor New York. On January 7, 2013, a grand jury returned an Indictment against Gundy in the United States District Court for the Southern District of New York charging him, under 18 U.S.C. § 2250, with being required to register under SORNA; traveling interstate from Pennsylvania to New York; and then failing to register as required.

C. District Court Proceedings

In March 2013, Gundy moved in the District Court to dismiss the Indictment for failure to state an offense. *See* Fed. R. Crim. P. 12(b)(3)(B)(v). Gundy argued principally that he was required to register only after the alleged interstate travel between Pennsylvania and New York, and thus could not have violated § 2250(a), the elements of which must be satisfied sequentially. The District Court agreed with Gundy and granted his motion.

In granting the motion, the court rejected the government's contention that Gundy, who was convicted of a covered crime before SORNA's enactment in 2006, was "required to register" as soon as SORNA became retroactive. The court interpreted 42 U.S.C. § 16913(b)(1)—which provides that a "sex offender shall initially register . . . before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement"—as demonstrating that Gundy was "required to register" under 18 U.S.C. § 2250(a)(1) only "shortly before he was released from custody in New York," and after he had traveled interstate, *United States v. Gundy*, No. 13 Crim. 8(JPO), 2013 WL 2247147, at *6, *13 (S.D.N.Y. May 22, 2013).

Accounting for the fact that the sentence Gundy was serving immediately before his release in New York was for violating the terms of his federal supervised release, and not for the Maryland sexual assault, the District Court held that the federal sentence was also "a sentence of imprisonment with respect to" Gundy's sex offense. *See id.* at *11-12. In a motion for reconsideration, the government argued for the first time that Gundy was nevertheless required to register at the latest before he completed his Maryland sentence pursuant to 42 U.S.C. § 16913(b)(1), because the language of the statute states that a sex offender must register "before completing *a* sentence of imprisonment," in the singular (emphasis added).

The District Court denied the government's motion, concluding that this argument was waived, but also rejecting it on the merits due to considerations of "statutory purpose and the rule of lenity." *United States v. Gundy*, No. 13 Crim. 8(JPO), 2013 WL 4838845, at *2-3, *6 (S.D.N.Y. Sept. 11, 2013). The government now appeals the court's orders.

DISCUSSION

Since the Indictment's dismissal raises questions of law, our review is *de novo*. *See United States v. Alfonso*, 143 F.3d 772, 775 (2d Cir. 1998).

The government argues that the Indictment should be reinstated because Gundy was "required to register" under SORNA from the moment he was designated a "sex offender" under the Act—at the latest, August 1, 2008, when the Attorney General's final guidelines on retroactivity became effective. According to the government, § 16913(b)—upon which the District Court principally relied—"does not purport to determine when an individual incurs an obligation to register under SORNA, [but] only when there has been a failure to make an initial registration as required by the statute." Appellant's Br. 21. The government argues, in the alternative, that even accepting Gundy's contrary contention that § 16913(b) specifies when a sex offender first is required to register, Gundy would have been required to register at the latest as of November 30, 2010, when he was released from Maryland custody into the custody of the Federal Bureau of Prisons. Under either interpretation, Gundy became a person "required to register" before his July 17, 2012 trip from Pennsylvania to New York.

We agree with the government's first argument that Gundy was a person "required to register" from the time SORNA became retroactive. A person is "required to register" under SORNA "[o]nce [that] person becomes subject to SORNA's registration requirements." *Carr*, 560 U.S. at 447. For Gundy, who was convicted of a sex offense in 2005, before SORNA's July 2006 effective date, the registration requirements attached at the latest on August 1, 2008, the effective date of the Attorney General's final guidelines, *see Lott*, 750 F.3d at 217; 5 U.S.C. § 553(d).

Gundy contends that he was not subject to SORNA's registration requirements at all until shortly before his 2012 release from federal custody. In urging this position, he relies principally on § 16913(b), which provides (as relevant here) that a "sex offender shall initially register . . . before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement." 42 U.S.C. § 16913(b)(1). Gundy points to subsection (b)'s reference to "initial" registration and reasons that a person cannot be "required to register" before that person is required *initially* to register.

Although § 16913(b) undoubtedly regulates initial registration, we disagree that this means that § 16913(b) also regulates when registration

requirements attach. It is our view that § 16913(b) is most naturally read to set deadlines for initial registration, not to establish the conditions that make registration mandatory. The provision is worded in terms of cutoff dates rather than beginning points: Thus, subsections (b)(1) and (2) direct that an offender sentenced to a term of imprisonment must initially register "*before* completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement," and that an offender not sentenced to a term of imprisonment must register "*not later than 3 business days after* being sentenced for that offense." 42 U.S.C. § 16913(b)(1), (2) (emphases added).

Gundy does not dispute this reading of the statute. Instead, he argues that there can be no "require[ment] to register" until an offender has reached a registration deadline. But this argument gives insufficient weight to the fact that § 2250(a) treats being "required to register" and "fail[ing] to register or update a registration as required" as separate and distinct elements of the criminal offense. 18 U.S.C. § 2250(a)(1), (3). The temporal relationship between these elements—the first necessarily is satisfied before the second, *see Carr*, 560 U.S. at 446—establishes that a person can be "subject to SORNA's registration requirements," *id.* at 447, before he or she is subject to immediate sanction for

"fail[ing] to register," 18 U.S.C. § 2250(a)(3).[5] Section 16913(b) does not regulate when registration requirements attach.

Gundy argues, *inter alia*, that the government's interpretation of when registration requirements attach undermines SORNA's purposes, contradicts Supreme Court precedent, and ignores other provisions of the Act. We find none of his arguments persuasive.

SORNA was enacted in part "to address the deficiencies in prior law that had enabled sex offenders to slip through the cracks." *Carr*, 560 U.S. at 455. According to Gundy, permitting sex offenders to satisfy their initial registration requirements by initially registering long before their release would, contrary to this purpose, enable "offenders . . . easily [to] abscond following their release from prison, before they had registered their community address." Appellee's Br. 28. This argument ignores that a sex offender, having initially registered, remains subject to SORNA's registration requirements and is required "not later than 3 business days" after a change in residence to update his or her registration

[5] Gundy's argument is also in tension with his assertion that he was required to register "shortly before" his release from custody. Were the government "simply wrong in asserting that 'a person can be required to register under a statute for a period of time prior to that person's deadline for completing that registration process,'" Appellee's Br. 24 (quoting Appellant's Br. 23), there would be no period of time before the deadline—however "short"—during which a person would be subject to a registration obligation.

information. 42 U.S.C. § 16913(c). Such an offender who initially registers and is then released from custody is in a position similar to that of a sex offender who is not sentenced to a term of imprisonment and must initially register "not later than 3 business days after being sentenced for that offense." *Id.* § 16913(b)(2). In either case, the sex offender is "required to register"; should he or she leave the state of conviction and thereafter fail to register, a federal criminal penalty may be imposed. In contrast, were the Court to adopt Gundy's position that a sex offender is "required to register" only upon the arrival of the offender's initial registration deadline, an offender not sentenced to a prison term—and thus, in Gundy's view, "required to register" 3 business days after sentencing—would not be subject to a federal criminal penalty if he or she left the state on the day of sentencing and thereafter failed to register. The travel would have occurred before the offender was "required to register," precluding prosecution. *See Carr*, 560 U.S. at 446. This result certainly would run counter to SORNA's purpose.

Gundy's attempt to use *Carr v. United States*, 560 U.S. 438 (2010), to challenge the government's position is not persuasive. In *Carr*, the Supreme Court faced the question whether a defendant who had both been convicted of a sex offense and traveled interstate before SORNA's enactment could be

convicted under § 2250(a) for failure to register. *See id.* at 442. The Court concluded that he could not. *See id.* at 458. In reaching this conclusion, the Court agreed with the defendant that the three elements of the crime necessarily would have had to occur after SORNA's effective date, rejecting the suggestion that being "required to register under [SORNA]" was merely "shorthand" for the status of having been convicted of a sex offense covered by SORNA. *Id.* at 446-47 (internal quotation marks omitted).

Gundy charges that the government's position here runs afoul of the *Carr* Court's holding that being "required to register" under SORNA "denotes a more specific meaning than being among a class of sex offenders, or having a prior sex offense conviction." Appellee's Br. 20. But the government's position, and the one we adopt here, is not that the set of persons who are "required to register" is equivalent to the set of persons who been convicted of a sex offense. Rather, it is that a sex offender is "required to register" once he or she is "subject to" SORNA's registration requirements. This can occur only after SORNA's effective date, and after SORNA has been made applicable to that person. Gundy, for example, was convicted in 2005, before SORNA's effective date, and therefore was "required to register" not upon his conviction, but only once SORNA was

made retroactively applicable to him. Further, the period of required registration does not necessarily persist indefinitely. A person for whom the statutorily prescribed registration period is complete is no longer subject to SORNA's registration requirements, even as he or she remains among the class of statutorily defined sex offenders. *See* 42 U.S.C. § 16915; 73 Fed. Reg. at 38,046-47.

Gundy points to the fact that the state has a duty to inform a sex offender of the registration requirements only "shortly before" his or her release from custody, 42 U.S.C. § 16917(a), as another reason to conclude that Gundy could not have been a person "required to register" until shortly before his release from federal custody consecutive to his state custody. But we have emphasized that SORNA's requirements for the states and for sex offenders are not necessarily interdependent: In *United States v. Hester*, 589 F.3d 86 (2d Cir. 2009) (per curiam), we held that the defendant's duty to register under SORNA was dependent neither on his actual knowledge of SORNA's requirements nor on the state's implementation of SORNA, *see id.* at 91-93; the application of the registration requirements cited in § 2250(a)(1) did not hinge on whether the state had provided notice of those requirements, *see id.* at 92. And in any case, the timing of the state's duty to provide notice is not random: An offender who is "required

to register" under SORNA but does not register is not vulnerable to any punishment until after the time at which the state incurs a duty to provide notice. This is because an offender cannot have "fail[ed] to" satisfy any SORNA requirement applicable to him or her until the deadline for satisfying that requirement has passed; for a sex offender sentenced to a term of imprisonment, the initial registration deadline is when he or she "complet[es] a sentence of imprisonment with respect to the offense giving rise to the registration requirement," 42 U.S.C. § 16913(b)(1).[6] That Congress required states to provide notice to sex offenders only shortly before their release from custody fails to demonstrate that Congress did not intend for sex offenders to be persons "required to register" from an earlier stage.

Further, any suggestion that Gundy could not have been a person "required to register" beginning in 2008 because registration would have been impossible for him to accomplish while in custody must be rejected. The statute expressly requires an offender sentenced to imprisonment to initially register while still in custody. *See* 42 U.S.C. § 16913(b)(1) (requiring a sex offender to register "before completing a sentence of imprisonment"). And the nature of the

[6] Indeed, any offender designated as such based on a state law conviction does not violate § 2250(a)—and is not subject to *federal* criminal sanction—unless he or she fails to register after traveling interstate.

registration information that a sex offender must provide accounts for the possibility that a sex offender may not have a current place of employment or permanent residence. For example, § 16914(a) requires a sex offender to provide the name and address of any place where the sex offender "resides *or will reside*," or "is . . . *or will be*" an employee or student. *Id.* § 16914(a)(3)-(5) (emphases added). Notably, it is only after initial registration, to "[k]eep[] the registration current," that a sex offender must "appear in person" to provide information, *id.* § 16913(c); and the particular requirement to keep one's registration current in this way does not apply to sex offenders during any period of custody or civil commitment, *see id.* § 16915(a); 73 Fed. Reg. at 38,068.

In sum, Gundy was a person "required to register" under SORNA beginning at the latest on August 1, 2008, the effective date of the Attorney General's final guidelines. This date arrived well before his alleged travel from Pennsylvania to New York. The District Court thus erred in concluding that Gundy became a person "required to register" under SORNA only after traveling interstate.

Gundy urges us, to the extent we disagree with the District Court, to affirm the court's dismissal order on the alternative ground that the travel

charged in the Indictment does not amount to "interstate travel" within the meaning of § 2250(a)(2)(B). Gundy notes that by virtue of his one-day travel agreement with the federal government, he remained in the custody of the Federal Bureau of Prisons when he traveled from Pennsylvania to New York to take up his residence in the halfway house. As a result, he argues, his travel fell outside the purview of § 2250(a)(2)(B). Gundy raised this issue before the District Court, but the District Court did not reach it. We leave it to the court on remand to decide in the first instance whether dismissal of the Indictment is warranted on this other ground.

CONCLUSION

For the reasons above, we REVERSE the District Court's order dismissing the Indictment. We REMAND the cause to the District Court for reinstatement of the Indictment and for further proceedings consistent this opinion. Gundy's appeal from the District Court's order denying reconsideration is moot.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
-against-	:	13 Crim. 8 (JPO)
HERMAN AVERY GUNDY, Defendant.	:	MEMORANDUM AND ORDER

J. PAUL OETKEN, District Judge:

Defendant Herman Avery Gundy is charged with one count of failing to register as a sex offender under the Sex Offender Registration and Notification Act, 18 U.S.C. § 2250. Gundy has moved to dismiss the Indictment. For the reasons that follow, his motion is granted.

I. Background

On July 11, 1994, Gundy pleaded guilty in the Eastern District of Pennsylvania to one count of conspiracy to distribute cocaine base, in violation of 21 U.S.C. § 846 ("the Federal Conviction"). On February 5, 1996, he was sentenced to five years' imprisonment and five years' supervised release. In 2004, jurisdiction over Gundy was transferred from the Eastern District of Pennsylvania to the District of Maryland.

On October 3, 2005, Gundy entered an *Alford* plea in a Maryland state court to the crime of Sexual Offense in the Second Degree ("the Maryland Conviction"). That same day, he was sentenced in Maryland state court to 20 years' imprisonment and five years' probation, with 10 years of the 20-year sentence suspended.

On March 23, 2006, Gundy appeared in the United States District Court for the District of Maryland and admitted to a violation of his federal supervised release based on the Maryland

Conviction. He was sentenced to 24 months' imprisonment and the remainder of his supervised release was terminated. This sentence was to be served consecutively to his Maryland sentence.

On June 15, 2011, Gundy was transferred from the custody of Maryland to the custody of the Bureau of Prisons (BOP) to serve the sentence imposed by virtue of his violation of the terms of his supervised release. Ultimately, he was sent to FCI Schuylkill in Minersville, Pennsylvania.

On March 23, 2012, Gundy signed a "Community Based Program Agreement." The Agreement contemplated that he would become "a resident" of an unspecified "residential reentry center [RRC] or work release program." On May 8, 2012, he signed a form titled "Conditions of Furlough." On June 7, 2012, Gundy signed a "Furlough Application – Approval and Record," which indicated that the "[p]urpose of the visit" that he sought was "[p]lacement in [an] RRC" in the Bronx, New York. This application stated that the "Method of Transportation" would be "bus/taxi." On June 12, 2012, the warden of FCI Schuylkill approved Gundy's furlough. That day, the warden signed a "Transfer Order" authorizing Gundy's transfer from FCI Schuylkill to the Bronx Residential Re-Entry Center in the Bronx, New York ("the Bronx RRC"). Gundy acknowledged that:

> I understand that if approved, I am authorized to be only in the area of the destination shown above and at ordinary stopovers or points on a direct route to or from that destination. I understand that my furlough only extends the limits of my confinement and that I remain in the custody of the Attorney General of the United States.

The furlough conditions limited approval to Gundy's "remain[ing] in the legal custody of the U.S. Attorney General, in service to a term of imprisonment." The warden also signed a form stating that Gundy had been "authorized for unescorted commitment" to the Bronx RRC.

On July 17, 2012, Gundy traveled via Greyhound bus from Schuylkill Haven, Pennsylvania to New York City and reported to the Bronx RRC. He was released from the Bronx RRC on August 27, 2012. Upon being released from the Bronx RRC, Gundy remained in the Bronx. He did not register as a sex offender in either New York or Maryland.

On September 13, 2012, Maryland issued a warrant for Gundy's arrest based on violation of the conditions of his probation relating to the Maryland Conviction. On October 24, 2012, law enforcement personnel arrested Gundy in the Bronx and transferred him to the custody of Maryland. Gundy was later transferred to the custody of the BOP. On January 7, 2012, Gundy was charged in this District with one count of violating 18 U.S.C. § 2250.

II. Standard of Review

"Since federal crimes are solely creatures of statute, a federal indictment can be challenged on the ground that it fails to allege a crime within the terms of the applicable statute." *United states v. Zahavi*, 12 Cr. 288, 2012 WL 5288743, at *1 (S.D.N.Y. Oct. 26, 2012) (quoting *United States v. Aleynikov*, 676 F.3d 71, 75-76 (2d Cir. 2012)); *see also* Fed. R. Crim. P. 12(b)(2) ("A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue."). "An indictment is sufficient when it charges a crime with sufficient precision to inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events." *United States v. Stavroulakis*, 952 F.2d 686, 693 (2d Cir. 1992).

III. Discussion

A. SORNA

On July 27, 2006, Congress enacted the Adam Walsh Child Protection and Safety Act of 2006 ("the Walsh Act"), Pub. L. No. 109-248, 120 Stat. 587. Title I of the Walsh Act codified

SORNA, the declared purpose of which is to "protect the public from sex offenders and offenders against children . . . [by] establish[ing] a comprehensive national system for the registration of those offenders." 42 U.S.C. § 16901. Congress's principal purpose in enacting SORNA was "to make sure sex offenders could not avoid all registration requirements just by moving to another state." *United States v. Guzman*, 591 F.3d 83, 91 (2d Cir. 2010). As the Second Circuit has explained, "[r]equiring sex offenders to update their registrations due to intrastate changes of address or employment status is a perfectly logical way to help ensure that states will more effectively be able to track sex offenders when they do cross state lines." *Id.*

Title 18, United States Code, Section 2250(a) makes it a federal crime for certain sex offenders to violate SORNA's registration requirements. Section 2250 provides:

> (a) **In General.**— Whoever—
>
> (1) is required to register under [SORNA];
>
> (2)
>
> (A) is a sex offender as defined for the purposes of [SORNA] by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
>
> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
>
> (3) knowingly fails to register or update a registration as required by [SORNA];
>
> shall be fined under this title or imprisoned not more than 10 years, or both.
>
> (b) **Affirmative Defense.**— In a prosecution for a violation under subsection (a), it is an affirmative defense that—

> (1) uncontrollable circumstances prevented the individual from complying;
>
> (2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and
>
> (3) the individual complied as soon as such circumstances ceased to exist.

Read together, the subsections of § 2250 create criminal liability when the Government can prove three elements: (1) the defendant was required to register under SORNA; (2) the defendant traveled in interstate or foreign commerce; and (3) the defendant knowingly failed to register or update a registration as required by SORNA. "For a defendant to violate this provision . . . the statute's three elements must be satisfied in sequence, culminating in a post-SORNA failure to register." *Carr v. United States*, 130 S. Ct. 2229, 2235 (2010). Thus if a sex offender travels in interstate commerce and then fails to register before becoming subject to SORNA's registration requirements, he cannot be found guilty for violating § 2250(a).

In relevant part, SORNA's registration requirements are set forth in 18 U.S.C. § 16913:

> (a) **In general**
>
> > A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.
>
> (b) **Initial registration**
>
> > The sex offender shall initially register—
> >
> > > (1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

> (2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) **Keeping the registration current**

> A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) **Initial registration of sex offenders unable to comply with subsection (b)**

> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

"Absent a valid rule by the Attorney General, SORNA is not retroactive to defendants . . . who were convicted of sex offenses requiring them to register before July 27, 2006." *United States v. Stevenson*, 676 F.3d 557, 560 (6th Cir. 2012); *see also Reynolds v. United States*, 132 S. Ct. 975, 984 (2012) ("[T]he Act's registration requirements do not apply to pre-Act offenders until the Attorney General so specifies" pursuant to 42 U.S.C. § 16913); *United States v. Herbert*, 09 Cr. 438, 2009 WL 4110472, at *3 (N.D.N.Y. Nov. 20, 2009) ("Congress delegated to the Attorney General the authority to define the retroactive application of SORNA's provisions to sexual offenders whose convictions occurred before the passage of SORNA by Congress or before the full implementation of SORNA by a given jurisdiction." (citing 42 U.S.C. § 16913)).

On February 28, 2007, the Attorney General promulgated an interim regulation providing that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 72 Fed. Reg. 8894-01 ("the Interim SORNA Regulation"). On August 1, 2008, the "SMART Guidelines" went into effect. The Guidelines provided that:

> The applicability of the SORNA requirements is not limited to sex offenders whose predicate sex offense convictions occur following a jurisdiction's implementation of a conforming registration program. Rather, SORNA's requirements took effect when SORNA was enacted on July 27, 2006, and they have applied since that time to all sex offenders, including those whose convictions predate SORNA's enactment.

73 Fed. Reg. 38,030. The Sixth Circuit has described the provenance of these guidelines:

> On May 30, 2007, the Attorney General published proposed guidelines from the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, called the SMART guidelines. The SMART guidelines stated that they were promulgated pursuant to the Attorney General's authority under 42 U.S.C. § 16912(b) to interpret and implement SORNA and restated the Attorney General's position that SORNA applied to all sex offenders, "including those whose convictions predate the enactment of the Act." 72 Fed. Reg. 30,210, 30,212. These guidelines were made open to comments until August 1, 2007. On July 2, 2008, the Attorney General published the final version of the SMART guidelines. 73 Fed. Reg. 38,030. In the final version, the Attorney General responded to comments regarding the issue of retroactivity, but kept the language the same. The final SMART guidelines stated their effective date as July 2, 2008, the date of publication.

Stevenson, 676 F.3d at 560; *see also United States v. Kidd*, 11 Cr. 20, 2011 WL 3352457, at *2-3 (E.D. Tenn. Aug. 3, 2011) *aff'd*, 12-5420, 2013 WL 870263 (6th Cir. Mar. 11, 2013). On January 28, 2011, without conceding that the Interim Rule and the SMART Guidelines were invalid, the Attorney General responded to further comments on the issue of retroactivity and

finalized the Interim Rule to dispel any doubts regarding SORNA's retroactivity. 75 Fed. Reg. 81,849, 81,850. This final regulation provided that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. § 72.3 ("the Final SORNA Regulation"). The Attorney General stated that the effective date of this latest final rule was January 28, 2011.

B. Whether Gundy Was "Required to Register" Under SORNA When He Traveled in Interstate Commerce

Gundy argues that the Indictment must be dismissed because he was not "required to register" under SORNA prior to when he crossed state lines by traveling from Pennsylvania to New York. He adds that he became subject to this duty only when he completed his continuous term of incarceration—at which point he was in New York. The Government disputes Gundy's arguments, insisting that Gundy has been subject to SORNA's registration requirements since SORNA was rendered retroactive. In the alternative, the Government might argue that Gundy became required to register under SORNA upon the completion of the sentence that he served in Maryland's prisons as punishment for the Maryland Conviction.

As an initial matter, the Government's suggestion that *every* sex offender has been subject to SORNA's registration requirements, and "required to register" under SORNA, ever since the Attorney General issued regulations rendering SORNA retroactive, must be rejected. As the Supreme Court explained in *Carr* when presented with a similar argument:

> By its terms, the first element of § 2250(a) can only be satisfied when a person "is required to register *under the Sex Offender Registration and Notification Act*." § 2250(a)(1) (emphasis added). In an attempt to reconcile its preferred construction with the words of the statute, the Government insists that this language is merely "a shorthand way of identifying those persons who have a [sex-offense] conviction in the classes identified by SORNA." Brief for United States 19–20. To reach this conclusion, the

> Government observes that another provision of SORNA, 42 U.S.C. § 16913(a), states that the Act's registration requirements apply to "sex offender[s]." A "sex offender" is elsewhere defined as "an individual who was convicted of a sex offense." § 16911(1). Thus, as the Government would have it, Congress used 12 words and two implied cross-references to establish that the first element of § 2250(a) is that a person has been convicted of a sex offense. Such contortions can scarcely be called "shorthand." It is far more sensible to conclude that Congress meant the first precondition to § 2250 liability to be the one it listed first: a "require[ment] to register under [SORNA]."

130 S. Ct. at 2235-36. While *Carr* was focused on policing the line between pre-Act and post-Act offenders, its point is more generally applicable: the status of being required to register under SORNA is not coextensive with the status of being a sex offender. Further, *Carr* must be taken as a caution that this first requirement—which sets in motion the sequence of events leading to criminal liability under § 2250—plays an essential role in the statutory scheme and has content independent of being subject *in general* to one or another of SORNA's requirements. *See id.* at 2238 ("Had Congress intended to subject any unregistered state sex offender who has ever traveled in interstate commerce to federal prosecution under § 2250, it easily could have adopted language to that effect."). Moreover, as explained *infra*, the Government's broad view of when a sex offender becomes required to register is incompatible with the statutory text.

Because SORNA was passed on July 27, 2006 and Gundy entered his *Alford* plea to the crime of Sexual Offense in the Second Degree in October 3, 2005, he is a pre-Act offender. The applicability of SORNA's registration requirements is therefore governed by § 16913(d), which authorizes the Attorney General to issue retroactivity guidelines. The Attorney General first did so on February 28, 2007 with the Interim SORNA Regulation, which provided that SORNA's requirements "apply to all sex offenders," including pre-Act offenders. He then promulgated the SMART Guidelines, which became effective on August 1, 2008 and stated that "SORNA's

requirements took effect when SORNA was enacted on July 27, 2006, and they have applied since that time to all sex offenders, including those whose convictions predate SORNA's enactment." Courts have split over whether the Interim SORNA Regulation survives scrutiny as administrative action, *see United States v. Reynolds*, 710 F.3d 498, 507 (3d Cir. 2013), but the SMART Guidelines have consistently survived such challenges, *see United States v. Kimble*, No. 11 Cr. 611, 2012 WL 5906863, at *2 (W.D.N.Y. Nov. 26, 2012) (finding that "the SMART Guidelines established that SORNA became effective in 2008"); *United States v. Mullins*, No. 11 Cr. 103, 2012 WL 3777067, at *3 (D. Vt. Aug. 29, 2012) ("This Court has already followed every circuit to reach the question in holding that the Attorney General exercised his authority to declare the law applied to pre-Act offenders . . . when the SMART Guidelines took effect.").

Thus, at least as of August 1, 2008, while still serving his Maryland sentence, Gundy became subject to § 2250 and § 16913. *Stevenson*, 676 F.3d at 565 ("[T]he SMART guidelines can and do have the force and effect of law, and they establish that SORNA became retroactive as of August 1, 2008."). Section 16913(a), however, distinguishes between normal registration requirements and the initial registration requirement, providing that "a sex offender shall register . . . in each jurisdiction where the offender resides . . . . [and] *for initial registration purposes only*, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence" (emphasis added). Tracking this distinction, § 16913(b) provides that a "sex offender *shall initially register*—(1) *before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement*" (emphasis added). SORNA thus describes a general registration requirement and provides for an initial registration scheme. Any authority exercised by the Attorney General pursuant to § 16913(d) would have rendered both § 16913(a) *and* § 16913(b) retroactive.

It would be nonsensical to conclude that Gundy was "required to register" under SORNA for purposes of § 2250(a)(1) *before* the date on which was required to "initially register" under § 16913. Therefore, a natural reading of § 16913(b)—together with other applicable law—suggests that Gundy's duty to register under SORNA did *not* become active on the date the SMART Guidelines took effect, on which date Gundy was serving his Maryland sentence. In other words, the SMART Guidelines did not render all pre-Act offenders immediately subject to a duty to register, such that the first element of SORNA will always be met for all pre- and post-Act sex offenders (also known as *all* sex offenders). Rather, as a pre-Act offender, Gundy became subject to SORNA's many requirements at least of the date the SMART Guidelines became effective. Those general requirements, however, include the specific requirement that a sex offender initially register "*before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement*" (emphasis added). This logic is confirmed by the SMART Guidelines, which explain that for sex offenders in prisoner populations at the time of SORNA's implementation, registration within the "normal SORNA time frame" means, as relevant here, "before release from imprisonment." 73 Fed. Reg. at 38,064. Gundy's sentence of imprisonment in Maryland for the sex offense to which he entered an *Alford* plea on October 3, 2005 plainly qualifies as a sentence covered by § 16913(b). Therefore, Gundy was not required to register under SORNA at least until the end of that prison term.

The critical question, however, is whether Gundy's period of incarceration in Maryland, Pennsylvania, and New York for violation of the terms of his federal supervised release qualifies under § 16913(b) as a "sentence of imprisonment *with respect to* the offense giving rise to the registration requirement." If so, then Gundy did not become subject to SORNA's registration requirement until he was released from custody inside New York and Gundy's motion must be

granted. If not, then Gundy became subject to SORNA's registration requirements at the end of the sentence imposed by Maryland's courts and his motion must be denied as to this argument.

The reading of § 16913(b) that best reconciles SORNA's text and purpose is that which *does* treat Gundy's sentence for violation of supervised release as "a sentence of imprisonment with respect to the offense giving rise to the registration requirement."

"As in any statutory construction case," analysis starts with the statutory text and "proceed[s] from the understanding that [u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Sebelius v. Cloer*, No. 12-236, 2013 WL 2149791, at *5 (U.S. May 20, 2013) (internal quotation marks and citations omitted). "If the text of a statute is ambiguous, then [the Court] must construct an interpretation consistent with the primary purpose of the statute as a whole." *United States v. Ripa*, 323 F.3d 73, 81 (2d Cir. 2003). Where a statutory ambiguity persists after examination of a statute's text, structure, and purpose, the rule of lenity places a thumb on the scale against a finding of criminal liability. *See United States v. Santos*, 553 U.S. 507, 514 (2008). All three of these rules apply here.

As explained *supra*, § 16913(b) requires inmates to "initially register" after completing a prison term "*with respect to* the offense giving rise to the registration requirement." (emphasis added). This language, which is not addressed by SORNA's legislative history, is less than a model of clarity in specifying the required relationship between the "sentence of imprisonment" and the "offense giving rise to the registration requirement." The key term is "with respect to."

On the one hand, "with respect to" might be understood as "imposed as punishment for" the registration offense. On the other hand, "with respect to" might be understood in a broader sense as "relating to," "arising from," "regarding," or "in connection with." *See, e.g., American Heritage Dictionary* (4th ed. 2001) (defining "respect" as, *inter alia*, a verb that means "to relate

or refer to; concern"); *Oxford English Dictionary* (2d ed. 1989) (identifying "with respect to" as definition I.4.e and cross-referencing to I.7.b., which defines "with respect" as meaning, *inter alia*, "[w]ith reference or regard *to* something" (emphasis in original)); *see also id.* (offering many definitions of "respect" that emphasize the relational character of this term, such as "1. *To have respect to*: a. To have regard or relation to, or connexion with, something . . . . b. To have reference, to refer, to something . . . 2. *To have respect to*: a. To turn *to*, refer *to*, for information . . . c. To give heed, attention, or consideration *to* something; to have regard *to*; to take into account). Indeed, courts have made very different use of the term "with respect to." *See, e.g.*, *Magwood v. Patterson*, 130 S. Ct. 2788, 2806 (2010) (holding a habeas corpus application is "second or successive" for purposes of AEDPA where, "with respect to" a claim, the alleged error "could and should have" been raised in the first petition); *Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705 n.4 (2d Cir. 2013) (examining circumstances under which a person "is a fiduciary with respect to a plan" under ERISA, and noting that when an entity acts with "dual roles," fiduciary duties are only implicated when it functions in its capacity as a fiduciary). The common thread across these opinions and definitions is that "with respect to" connotes a connection with or relationship to, though not necessarily or even usually a state of identity with, the object of the phrase.

In most cases, this ambiguity in the meaning of "with respect to" will not matter. If a sex offender serves a prison sentence for the offense that creates the duty to register, and is then released from custody, his duty is activated at the end of his time in prison. If that sex offender is later caught and convicted of another crime, the question whether he is obligated to register while in prison does not implicate the initial registration issue that the parties dispute in this case.

Gundy's situation, however, directly implicates the ambiguity in § 16913(b)'s reference to a "sentence of imprisonment *with respect to* the offense giving rise to the registration requirement" (emphasis added). Unlike most offenders– and unlike the typical offender that Congress and the Attorney General likely imagined when crafting the applicable law—Gundy completed a sentence of imprisonment for his Maryland sex offense and then *immediately* began a consecutive sentence of imprisonment for his violation of federal supervised release, a violation premised on the same underlying Maryland sex offense. This transition occurred while he was incarcerated in the same prison in Maryland; one day, he was in the same cell for a different reason. He was never released from prison. He was not even moved to a different prison, at least not initially. And the violation that caused his supervised release sentence consisted of exactly the same conduct that gives rise to his registration requirement. Gundy thus served back-to-back sentences for a single course of conduct—his sex offense—which simultaneously broke Maryland's criminal code and the terms of his supervised release.

On this fact pattern, the textual question is whether Gundy's time in prison for violating his supervised release in this manner qualifies as a sentence "with respect to" his Maryland sex offense. The answer is no if the text is read to mean "imposed as punishment for the offense giving rise to the registration requirement." The answer is yes if the text is read to mean "relating to," "arising from," or "in connection with" the offense giving rise to the registration requirement. The difference is thus all-important to Gundy, yet unsusceptible to resolution through analysis keyed only to the statute's plain language. The phrase "with respect to" is too ambiguous in this context to serve as the definitive predicate of Gundy's conviction.

A combination of statutory purpose and rule of lenity must therefore guide the outcome. Starting with purpose, SORNA's criminal provisions are "not a stand-alone response to the

problem of missing sex offenders." *Carr*, 130 S. Ct. at 2240. Rather, § 2250 is "embedded in a broader statutory scheme enacted to address the deficiencies in prior law that had enabled sex offenders to slip through the cracks." *Id.* That scheme includes provisions "repealing several earlier federal laws that also (but less effectively) sought uniformity; [] setting forth comprehensive registration-system standards; [] making federal funding contingent on States' bringing their systems into compliance with those standards; [] requiring both state and federal sex offenders to register with relevant jurisdictions (and to keep registration information current); and [] creating federal criminal sanctions applicable to those who violate the Act's registration requirements." *Reynolds*, 132 S. Ct. at 978.

Section 2250 thus plays a limited, though important, role in the larger SORNA scheme: "mak[ing] sure sex offenders could not avoid all registration requirements just by moving to another state." *Guzman*, 591 F.3d at 91. This is why "[t]he act of travel by a convicted sex offender may serve as a jurisdictional predicate for § 2250, but it is also, like the act of possession [under 18 U.S.C. § 922(g)], the very conduct at which Congress took aim." *Carr*, 130 S. Ct. at 2240. Thus, when sex offenders "use the channels of interstate commerce in evading a State's reach," their conduct implicates the animating purpose of SORNA's criminal provisions. *Id.* at 2238. Otherwise, however, Congress has given "the States primary responsibility for supervising and ensuring compliance among state sex offenders." *Id.*

Given that there is virtually no risk that a sex offender will fall through the cracks or go missing while incarcerated, it would make little sense to apply SORNA's registration requirements and criminal provisions to incarcerated individuals. In fact, Congress recognized that the public is adequately protected against sex offenders locked behind bars: this is why sex offenders are not required under § 16913(b) to initially register until the *end* of their post-

conviction carceral sentences. The Attorney General's SMART Guidelines confirm that "SORNA's registration requirements generally come into play *when sex offenders are released from imprisonment*, or when they are sentenced if the sentence does not involve imprisonment." 73 Fed. Reg. at 38,045 (emphasis added). The Guidelines add that "'imprisonment' as it is used in SORNA and these Guidelines refers to incarceration pursuant to a conviction, regardless of the nature of the institution in which the offender serves the sentence." *Id.*

This logic, which presupposes that there is little purpose to imposing a duty of initial registration on an incarcerated sex offender, appears again later in the SMART Guidelines:

> *Example 3*: A sex offender convicted in 1980 for an offense subject to lifetime registration under SORNA is released from imprisonment in 1990 but is not required to register at the time because the jurisdiction had not yet established a sex offender registration program. In 2010, following the jurisdiction's implementation of SORNA, the sex offender reenters the system because of conviction for a robbery. The jurisdiction will need to require the sex offender to register based on his 1980 conviction for a sex offense when he is released from imprisonment for the robbery offense. But it is not possible to carry out the initial registration procedure for the sex offender prior to his release from imprisonment for the registration offense – i.e., the sex offense for which he was convicted in 1980-because that time is past . . .
>
> . . . . In [cases like Example 3], the normal SORNA initial registration procedures and timing requirements will apply, but with the new offense substituting for the predicate registration offense as the basis for the time frame. In other words, such a sex offender must be initially registered in the manner specified in SORNA § 117(a) prior to release from imprisonment for the new offense that brought him back into the system, or within three business days of sentencing for the new offense in case of a non-incarcerative sentence.

73 Fed. Reg. at 38,063-64. Here, even though the offender would be incarcerated on a different offense than the offense giving rise to his duty to register, the Attorney General instructs states to view the initial registration requirement as one that arises at the *end* of the carceral sentence.

This provision reflects SORNA's basic logic, which does not treat incarcerated sex offenders as a group subject to a duty of initial registration during their time in prison.

A clear focus on offenders outside of custody runs through SORNA's text and its implementing regulations. Section 16913 requires offenders to register in each jurisdiction in which they reside, work, or study—requirements that all envision individuals outside of prison, free to go about their lives in multiple jurisdictions. Offenders are also required to periodically appear in person to keep their registration current, a mandate that further exemplifies Congress's presupposition that offenders with a duty to register are out of custody.

In the same vein, 42 U.S.C. § 16915(a) requires sex offenders to keep their "registration current for the full registration period (excluding any time the sex offender is in custody or civilly committed) unless the offender is allowed a reduction under subsection (b) of this section." Offenders are thus relieved of the obligation to keep their registration current while incarcerated—yet another feature of SORNA's registration scheme that indicates Congress's focus on out-of-custody offenders and its recognition that the purposes of SORNA's criminal provisions are not ordinarily fulfilled by imposing registration requirements on incarcerated offenders. *See also* 42 U.S.C. § 16914 (requiring that as part of registration, offenders provide information of a sort associated with being out of custody rather than imprisoned, including license plate numbers for any cars they drive and information about where they work). The SMART Guidelines accordingly recognize that "[t]he proviso relating to custody or civil commitment" in § 16915(a) "reflects the fact that the SORNA procedures for keeping up the registration . . . generally presuppose the case of a sex offender who is free in the community." They do so, the Guidelines explain, because "[w]here a sex offender is confined, the public is protected against the risk of his reoffending in a more direct way, and more certain means are

available for tracking his whereabouts. Hence, SORNA does not require that jurisdictions apply the registration procedures applicable to sex offenders in the community during periods in which a sex offender is in custody or civilly committed." 73 Fed. Reg. at 38,068.

Thus, as manifested in its statutory text and implementing regulations, SORNA's purpose is not ordinarily served by imposing on inmates who have not been released from prison following their sex offense conviction a duty of initial registration.[1]

In many cases, such a requirement could lead to absurd results. Inmates are regularly moved between jurisdictions while in custody. Often, these transfers are orchestrated without their consent. Even if those inmates enjoyed an affirmative defense under § 2250(b) to liability under § 2250(a) for failure to register while imprisoned, the result would that a significant number of inmates have already satisfied elements (1) and (2) of § 2250 the moment they step past prison gates on their way to freedom. Failure to register within a short period would then perfect the § 2250 offense and return them to federal prison for an offense that, in the usual course, would implicate only the requirements of state sex offender registration schemes.

The Government's proposed interpretation of SORNA would thus result in a disruption of the state-federal balance contemplated by Congress, as it would federalize a large swath of post-custody failure-to-register offenses that do not reflect any uniquely federal power or concern. *See Carr*, 130 S. Ct. at 2238 (noting that Congress has given "the States primary responsibility for supervising and ensuring compliance among state sex offenders"); *see also United States v. Van Buren, Jr.*, No. 8 Cr. 198, 2008 WL 3414012, at *13 (N.D.N.Y. Aug. 8, 2008) *aff'd sub nom. United States v. Van Buren*, 599 F.3d 170 (2d Cir. 2010) (noting that

[1] A different question may arise if an inmate is released from custody, spends time in society, and is then returned to prison, but that question is not presented by this motion.

SORNA "does not offend traditional notions of federalism *because it addresses something each state does not have the power to accomplish* – track registered sexual offenders as they move from state to state." (emphasis added)). Moreover, this disruption in federalism would arise in a context shot through with questions of fundamental fairness, since in many cases the predicate act of interstate travel would have been imposed on an unwilling sex offender—who might well be excused from recognizing that failure to register in his new state violates SORNA, instead of state law. Ultimately, the Government's view would undercut the purpose and logic of SORNA's criminal liability provisions. As the Second Circuit recognized in *Guzman*, § 2250 is designed to make sure that sex offenders cannot dodge registration requirements by skipping from one state to another. 591 F.3d at 91. The interstate travel is thus the very act at which SORNA takes aim. *See Carr*, 130 S. Ct. at 2238-40. Where an inmate is in continuous carceral custody throughout his period of interstate travel, and is therefore being monitored by the government at every step along the way, it defies reason to view a post-release failure to register as an effort to "use the channels of interstate commerce in evading a State's reach." *Id.*

There is no reason to believe that all these considerations are any less decisive in Gundy's case. He was incarcerated continuously throughout his consecutive sentences. He did not present a danger that the government would lose him, that he would fall through the cracks, or that he would "use the channels of interstate commerce in evading a State's reach." *Carr*, 130 S. Ct. at 2238. He did not pose a danger to the community while in prison. He would have been required to register upon his release from custody wherever that release took place; there is no reason to believe that his failure to register after being released from custody in New York implicates SORNA's purposes any more than his failure to register would have done had he been released in Maryland. In either case, he could have been punished by the state government for

failing to register, or by the federal government if he subsequently moved in interstate commerce and knowingly failed to register as required by SORNA. In sum, it would not advance any core purpose of SORNA to conclude that Gundy's supervised release sentence was *not* a sentence of imprisonment "with respect to" his Maryland sex offense. SORNA is not designed to ensure that prisoners can be arrested for a federal crime in the very state where they are released from prison for the first time after serving a sentence "with respect to" their sex offense.[2]

This conclusion is bolstered by the rule of lenity. As Justice Scalia has explained:

> Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

Santos, 553 U.S. at 514. Section 16913 is sufficiently ambiguous that even experienced counsel would have been hard-pressed to explain to Gundy his potential liability for failing to register upon his release from the RRC in New York. Given that Congress has not spoken clearly, that the notice function associated with statutory criminal law was clouded by ambiguity, and that the purposes of SORNA weigh against the imposition of liability, a construction of SORNA that precludes liability here is required.

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[2] The Government raises the specter of a constitutional concern with this conclusion, since post-revocation penalties relate to the initial offense—and would raise an issue of double jeopardy if they were treated as punishment for the new criminal offense. *See Johnson v. United States*, 529 U.S. 694, 700 (2000). But that concern is misplaced. Acknowledging that Gundy's sentence for violation of his supervised release is a sentence "with respect to" his Maryland criminal offense is not the same as concluding that it constitutes punishment for that offense. In other words, the Court can recognize the reality of a relationship between Gundy's conduct in Maryland and his post-revocation penalties without implicating the double jeopardy issue noted in *Johnson*. As a result, there is no need to construe "with respect to" in the shadow of constitutional avoidance.

The SMART Guidelines do not alter – and in fact support – this conclusion. In the Guidelines, the Attorney General states that "jurisdictions must normally require that sex offenders be initially registered before release from imprisonment for the registration offense." He adds that, under § 117(a) of SORNA, "initial registration procedures are to be carried out 'shortly before release of the sex offender from custody' . . . . [J]urisdictions should implement this requirement in light of the underlying objectives of ensuring that sex offenders have their registration obligations in mind when they are released." 73 Fed. Reg. at 38,063. The Attorney General later notes that if a pre-Act offender started his carceral sentence *before* SORNA took effect and is released on "completion of imprisonment" *after* SORNA takes effect, that offender "can be registered prior to release from imprisonment in the same manner as sex offenders convicted following the enactment of SORNA and its implementation by the jurisdiction." *Id.*

Each of these SMART Guidelines provisions expressly contemplates a scenario in which the sex offender at issue is released from custody at the end of his term of imprisonment for the "registration offense." Thus, jurisdictions must "normally" require registration at that point – a qualification that implies the existence of cases where the duty to register does *not* attach at the end of the sentence imposed as punishment for the registration offense. This is one such case, as Gundy's consecutive sentence makes him unlike the "normal" sex offender. Further, states must register an offender before he is "released from custody," on "completion of imprisonment," or on "release from imprisonment." This language further supports the conclusion that the Attorney General was not considering a situation like Gundy's in promulgating these rules. Even to the extent that Gundy was technically "released" from imprisonment for his registration offense when the basis for incarceration in Maryland shifted from a state crime to violation of supervised release, his continued presence behind bars removed him from the class of offenders

contemplated by the plain terms of the SMART Guidelines. Thus, the SMART Guidelines arguably endorse Gundy's view of when he was required to register, since they repeatedly and logically link the initial registration requirement to release from custody.[3] In the alternative, they are ultimately silent as to this matter because it is not a "normal[]" case and the Court must look directly to § 16913(b)—the statute that the Attorney General is interpreting in the Guidelines.

The upshot of this analysis is that Gundy's duty to initially register was triggered shortly before he was released from custody in New York. Gundy was in custody when transferred from the Maryland prison to FCI Schuylkill, and then, by the plain language of the transfer documents, remained in the "legal custody of the [Attorney General], in service to a term of imprisonment" during his unsupervised transfer from Pennsylvania to New York. These documents confirmed that his transfer "only extend[ed] the limits of [his] confinement" and his "custody." As a sex offender who was imprisoned for committing a sex offense and who then remained in custody continuously through his release in New York—first while serving a sentence imposed as punishment for the sex offense, and then while serving a post-revocation sentence "with respect to" the sex offense—Gundy was not "required to register" when he engaged in the interstate travel alleged in the Indictment and therefore cannot be held liable for a violation of § 2250.

Accordingly, the Indictment must be dismissed.

C. Gundy's Other Arguments In Support of Dismissal

Gundy also advances a number of other arguments in support of dismissal. Because the Court has granted his motion on statutory grounds, it need not reach his constitutional claims.

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[3] This analysis might be different if Gundy had been sentenced to consecutive prison terms for crimes that bore no relation—for instance, a sex offense and then an unrelated bank robbery—since in that scenario the robbery sentence might not qualify as a term of imprisonment "with respect to" to the sex offense. However, that issue is not presented in this case.

IV. Conclusion

For the foregoing reasons, Defendant's motion to dismiss the indictment is GRANTED.

SO ORDERED.

Dated: New York, New York
May 22, 2013

J. PAUL OETKEN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
-against-	:	13 Crim. 8 (JPO)
HERMAN AVERY GUNDY, Defendant.	:	OPINION AND ORDER

J. PAUL OETKEN, District Judge:

Defendant Herman Avery Gundy was charged with one count of failing to register as a sex offender under the Sex Offender Registration and Notification Act ("SORNA"), 18 U.S.C. § 2250. On May 22, 2013, this Court granted Gundy's motion to dismiss the indictment, holding that Gundy was not subject to SORNA's registration requirements at the time of the interstate travel alleged by the Government. *United States v. Gundy*, No. 13 Crim. 8, 2013 WL 2247147 (S.D.N.Y. May 22, 2013) ("the Opinion"). Advancing new arguments, the Government now seeks reconsideration of the Opinion. Though responsive to some of the concerns addressed in the Opinion, these arguments do not succeed. For the reasons that follow, the motion for reconsideration is denied.

I. Legal Standard

"A motion for reconsideration is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *Drapkin v. Mafco Consol. Group, Inc.*, 818 F. Supp. 2d 678, 695 (S.D.N.Y. 2011) (quotation marks and citation omitted). Accordingly, "[t]he threshold for prevailing on a motion for reconsideration is high." *Nakshin v. Holder*, 360 F. App'x 192, 193 (2d Cir. 2010); *see Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) ("The standard for granting such a motion is strict."). "Although the federal

and local rules of criminal procedure do not specifically provide for motions for reconsideration, courts in this district have applied Local Civil Rule 6.3 in criminal cases." *United States v. Peterson*, No. 12 Crim. 409, 2012 WL 5177526, at *1 (S.D.N.Y. Oct. 19, 2012).

II. Discussion[1]

The Supreme Court has held that a person commits a violation of § 2250 only if he (1) is "required to register under [SORNA]"; (2) *subsequently* "travels in interstate or foreign commerce"; and (3) *subsequently* "knowingly fails to register . . . ." 18 U.S.C. § 2250; *see Gundy*, 2013 WL 2247147, at *3 (citing *Carr v. United States*, 560 U.S. 438 (2010)). In the Opinion, this Court concluded that the first element was not met until *after* Gundy traveled in interstate commerce. This is because, as the Court explained: (1) Gundy's duty to "initially register" under 18 U.S.C. § 16913 arose just before completion of "a sentence of imprisonment with respect to the offense giving rise to the registration requirement"; (2) Gundy's federal sentence for violation of supervised release ("VOSR") based on his Maryland conviction—which immediately followed his sentence on the Maryland conviction itself—was "a sentence of imprisonment with respect to the offense giving rise to the registration requirement" (namely, the Maryland sex offense); and (3) Gundy did not complete that federal sentence until *after* he traveled in interstate commerce. *See Gundy*, 2013 WL 2247147, at *4-13.

A.

The Government's request for reconsideration opens with an argument that it did not advance in its original brief, at oral argument, or in its post-argument brief. This argument focuses on the third word of 18 U.S.C. § 16913(b)(1): "before completing *a* sentence of

[1] Familiarity with the Opinion and all other facts relevant to the case is presumed.

imprisonment with respect to the offense giving rise to the registration requirement." (emphasis added). In the Government's view, that single word controls this case: Because the sentence for his Maryland conviction was "a sentence of imprisonment," and because the statute refers to "a" sentence rather than "any" or "all" sentences, Gundy's duty to register attached on or before November 30, 2010—the date on which he completed the sentence for his Maryland conviction and thus, by implication, the date before which he was required to initially register. *See* § 16913 (b)(1). This is so, the Government argues, because he literally completed "*a* sentence of imprisonment with respect to the [sex] offense" on that date—even though he was not released and was immediately transferred to federal custody to begin serving *another* "sentence of imprisonment with respect to the [sex] offense."

This argument, although presenting a stronger textual basis for the Government's position than its previous arguments, must be rejected for several reasons.

First, motions for reconsideration are not the appropriate mechanism for advancing purportedly dispositive arguments for the first time. As the Second Circuit has emphasized, "[g]enerally, motions for reconsideration are not granted unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Cioce v. County of Westchester*, 128 F. App'x 181, 185 (2d Cir. 2005). Accordingly, "a party may not advance new facts, issues, or arguments not previously presented to the Court." *Polsby v. St. Martin's Press, Inc.*, No. 97 Civ. 690, 2000 WL 98057, at *1 (S.D.N.Y. Jan. 18, 2000) (citation omitted). "Simply put, courts do not tolerate such efforts to obtain a second bite at the apple." *Goonan v. Fed. Reserve Bank of New York*, No. 12 Civ. 3859, 2013 WL 1386933, at *2 (S.D.N.Y. Apr. 5,

2013). By waiting until this late stage in the case, and failing to identify any new decision or data in support of its plain language interpretation, the Government has waived this argument.

Second, even on its own terms, the Government's argument does not rid § 16913(b)(1) of the ambiguity that required invocation of statutory purpose and the rule of lenity.

"As in any statutory construction case," analysis begins with the statutory text and "proceed[s] from the understanding that [u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013) (internal quotation marks and citations omitted). "The meaning of a word [or phrase] cannot be determined in isolation, but must be drawn from the context in which it is used.'" *United States v. Torres*, 703 F.3d 194, 199 (2d Cir. 2012) (quoting *In re Sept. 11 Prop. Damage Litig.*, 650 F.3d 145, 155 (2d Cir. 2011)); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law* 168 (2012) (noting that "statutory construction is a holistic endeavor"). "If the text of a statute [remains] ambiguous, then [the Court] must construct an interpretation consistent with the primary purpose of the statute." *United States v. Ripa*, 323 F.3d 73, 81 (2d Cir. 2003).

Section 16913(b) provides that a sex offender shall initially register "before completing a sentence of imprisonment . . . ." While the Government sees perfect clarity in this sentence, § 16913(b)(1) remains ambiguous in a crucial respect: by using the indefinite article to modify "sentence of imprisonment," Congress failed to distinguish between "any" and "a single." This distinction makes all the difference to Gundy.

As a matter of plain language, the Government's reading is certainly a legitimate one. Consider the sentence: "You must apply for kindergarten before completing a year of preschool." It is fairly obvious from the context of the sentence that "*a* year of preschool" is intended to mean "*a single* year of preschool." But consider the following directive from a

doctor: "You must take one of these pills before finishing a meal" (or "Take one pill with a meal"). This is probably better read as meaning "before finishing *any* meal" (or "with *any* meal"). And consider the sentence: "You must stay out of the swimming pool until 15 minutes after eating a candy bar." Given the context, the better reading of this sentence is that it refers to *any* candy bar—and that if someone ate three candy bars consecutively, the 15-minute moratorium would be triggered by the eating of the *third* candy bar.

The meaning of "a" thus depends on context. *See, e.g.*, *Hagen v. Nodak Mutual Insurance Co.*, No. 99 Civ. 3562, 2000 WL 35528125 (D.N.D. May 8, 2000) ("As a general principle the use of an indefinite article may create an inherent ambiguity, depending on how the indefinite nature of the article is interpreted."). Although statutory context can eliminate ambiguity, *see S.E.C. v. KPMG LLP*, 412 F. Supp. 2d 349, 388 (S.D.N.Y. 2006), nothing else in § 16913(b) settles the choice between these two meanings of "a." While Gundy had completed "a single" sentence of imprisonment when time expired on the sentence for his Maryland conviction, SORNA can also be read to impose a duty to register before completing "any" sentence of imprisonment. In the latter case, the most natural reading (or at least a possible reading) of § 16913(b) is one that requires a defendant like Gundy—sentenced to multiple, consecutive terms of imprisonment "with respect to" the offense giving rise to the registration duty—to register before completing his final sentence of imprisonment.[2] Given this ambiguity in the statutory text, the Court must consult statutory purpose and the rule of lenity. As

[2] As noted in the Opinion, the Guidelines promulgated by the Attorney General lend support to this reading. They state that "SORNA's registration requirements generally come into play *when sex offenders are released from imprisonment*, or when they are sentenced if the sentence does not involve imprisonment." *Gundy*, 2013 WL 2247147, at *9 (quoting 73 Fed. Reg. 38,030, 38,045) (emphasis added).

explained in the Opinion, these factors cut strongly in Gundy's favor. *See* 2013 WL 2247147, at *8-12.

Third, the structure of the statutory text provides a simpler explanation for the statute's use of the word "a"—one that weakens the Government's textual argument.

The discussion thus far has assumed that the Government correctly framed the relevant question by focusing narrowly on § 16913(b)(1). It is a basic rule of interpretation, however, that each sub-section of a statute must be read in the context of the larger statutory structure. As its title indicates, § 16913(b) is concerned with the timing of initial registration. To that end, § 16913(b) contemplates two classes of offenders: those who have been sentenced to imprisonment, § 16913(b)(1), and those who received non-carceral sentences, § 16913(b)(2). When Congress referred to offenders who have completed "a sentence of imprisonment," it did so only to distinguish offenders who received "a sentence *of imprisonment*" from offenders who were "*not* sentenced to a term of imprisonment." (emphasis added). This perspective clarifies why Congress used the indefinite article in § 16913(b)(1): it was not concerned with (or apparently aware of any need for) specifying *which* sentence of imprisonment triggers the duty of initial registration, but rather with separating those offenders who have received a carceral sentence from those who have received a non-carceral sentence. Use of the indefinite article to describe these classes makes sense, whereas it would have been strange for Congress to use the indefinite article as its method of indicating when in time a duty of initial registration attaches. As a result, it would be erroneous to require "a" to bear all the weight the Government places on it. In statutory context, the word "a" simply does not bear on the question whether Gundy's initial registration duty attached at the end of his Maryland sentence. Accordingly, the Government's first textual argument does not succeed.

B.

The Government's second argument for reconsideration focuses on "with respect to." In sum, the Government notes that "offense" is used throughout SORNA to refer to the crime of conviction resulting in a defendant's registration obligation—in this case, Gundy's Maryland sex crime. Emphasizing that a violation of supervised release is distinct from any underlying state offense, and that Gundy's VOSR sentence punished his "breach of trust," the Government argues that the two convictions cannot be said to be "with respect to" one another.

The Court has already addressed and rejected an essentially identical version of this argument. *See Gundy*, 2013 WL 2247147, at *7-8. The Government is mistaken in its suggestion that the Opinion treated the VOSR sentence as part of, or as an extension of, the Maryland sentence. *See id.* at *7-8, *11; *see also id.* at *11 n.2 ("The Government raises the specter of a constitutional concern with this conclusion, since postrevocation penalties relate to the initial offense—and would raise an issue of double jeopardy if they were treated as punishment for the new criminal offense. *See Johnson v. United States*, 529 U.S. 694, 700 (2000). But that concern is misplaced. Acknowledging that Gundy's sentence for violation of his supervised release is a sentence 'with respect to' his Maryland criminal offense is not the same as concluding that it constitutes punishment for that offense. In other words, the Court can recognize the reality of a relationship between Gundy's conduct in Maryland and his post-revocation penalties without implicating the double jeopardy issue noted in *Johnson*. As a result, there is no need to construe 'with respect to' in the shadow of constitutional avoidance."). As the Court noted in the Opinion, the phrase "with respect to" connotes relationships other than identity. *Id.* at *8. Here, "the violation that caused [Gundy's] [VOSR] sentence consisted of

exactly the same conduct that gives rise to his registration requirement." *Id.* Further, that conduct constituted a violation of the terms of Gundy's supervised release only because it was, in fact, prohibited by the criminal law—and the terms of Gundy's supervised release were keyed, in part, to compliance with that body of law. At the very least, SORNA's text is ambiguous as to whether his VOSR offense was an offense "with respect to" his Maryland conviction.

C.

The Government also argues that treating Gundy as having been "required to register" no later than November 30, 2010 is consistent with SORNA's purpose. The Court considered and rejected similar purpose-related arguments in the Opinion, concluding that SORNA's purpose—as expressed in Second Circuit and Supreme Court precedent, the statutory text, and the Attorney General's implementing regulations—cuts firmly in Gundy's favor. *See id.* at *8-12. The Government advances only one novel argument: given that SORNA requires offenders to register in the jurisdiction of their conviction, and that SORNA aims to ensure that authorities do not lose track of sex offenders, it would be consistent with SORNA's purpose to prefer a rule whereby sex offenders register while incarcerated in the jurisdiction of their offense.

Even to the extent that this argument clarifies an aspect of SORNA, the core purposes and operation of the statute, as described in the Opinion, override this single factor. *See id.* at *9 ("Given that there is virtually no risk that a sex offender will fall through the cracks or go missing while incarcerated, it would make little sense to apply SORNA's registration requirements and criminal provisions to incarcerated individuals. In fact, Congress recognized that the public is adequately protected against sex offenders locked behind bars: this is why sex offenders are not required under § 16913(b) to initially register until the *end* of their post-

conviction carceral sentences."); *id.* at *10 ("A clear focus on offenders outside of custody runs through SORNA's text and its implementing regulations."). So do the weighty considerations of fairness and federalism—unaddressed in the Government's brief—that the Opinion highlighted as critical to any understanding of SORNA. *See id.* at *10 ("Inmates are regularly moved between jurisdictions while in custody. Often, these transfers are orchestrated without their consent. Even if those inmates enjoyed an affirmative defense under § 2250(b) to liability under § 2250(a) for failure to register while imprisoned, the result would [be] that a significant number of inmates have already satisfied elements (1) and (2) of § 2250 the moment they step past prison gates on their way to freedom. Failure to register within a short period would then perfect the § 2250 offense and return them to federal prison for an offense that, in the usual course, would implicate only the requirements of state sex offender registration schemes."); *id.* at *11 ("The Government's proposed interpretation of SORNA would [] result in a disruption of the state-federal balance contemplated by Congress, as it would federalize a large swath of post-custody failure-to-register offenses that do not reflect any uniquely federal power or concern . . . . Moreover, this disruption in federalism would arise in a context shot through with questions of fundamental fairness, since in many cases the predicate act of interstate travel would have been imposed on an unwilling sex offender—who might well be excused from recognizing that failure to register in his new state violates SORNA, instead of state law.").

In any event, the Government's arguments rest on questionable assumptions. It is not clear, for instance, why an offender's jurisdiction of conviction is "uniquely situated to know whether the offender has been convicted of a sex offense." When inmates are transferred within jurisdiction or to new jurisdictions, there is every reason to believe that information about their offense and post-conviction requirements travels with them. Every facility to which Gundy was

transferred, for example, was well aware of his status as a sex offender—and the Government offers no concrete evidence for its suggestion that prison officials have a difficult time tracking sex offender status.[3] Further, if an inmate were transferred from state to state—or from facility to facility—after initially registering, he would still have to register at each new location to ensure that the jurisdiction of conviction did not lose track of him. As a result, the reading of SORNA advanced by the Government still involves a series of registrations as inmates are moved from prison to prison—and thus presupposes the adequacy of registration schemes across facilities as prisoners are moved from one to the next. While initial registration may be unique in some respects, the Government has not explained how and why that uniqueness compels a rule that imposes a duty of initial registration at the end of the first prison sentence with respect to the offense giving rise to the registration duty. More broadly, the Government has not identified any reason for concluding that the view of SORNA set forth in the Opinion would thwart full realization of SORNA's purpose. Accordingly, the Government's purpose-based arguments do not warrant reconsideration of the Court's decision.

D.

In his motion to dismiss the indictment, Gundy presented several additional arguments for dismissal of the indictment which the Court did not reach, including (1) that SORNA violates

[3] There is little record evidence addressed to the question of why Gundy did not register as a sex offender when he completed his Maryland sentence—or to the question of why Maryland State officials, who the Government insists are in the best position to handle such matters, failed to ensure Gundy's registration. But the record is replete with evidence that federal officials *were* aware of Gundy's status as a sex offender and *did* remind him of his duty to register. The facts of this case thus suggest that, in at least some instances, officials in the jurisdiction of conviction will be less capable than officials in a jurisdiction to which an inmate is transferred of ensuring that the inmate complies with SORNA's registration requirements.

the Commerce Clause and (2) that Gundy cannot lawfully be found to have "traveled in interstate commerce" for purposes of criminal liability because he was "in custody" at the time of his interstate travel. In light of the Court's decision to deny reconsideration, it is unnecessary to resolve these alternative arguments. It should be noted, however, that the Second Circuit recently considered a Commerce Clause challenge to SORNA based (like Gundy's challenge) on the Supreme Court's decision in the Affordable Care Act case, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) ("*NFIB*"). The Second Circuit declined to revisit a prior decision upholding SORNA under the Commerce Clause, "not because [the defendant's] arguments all lack force, nor because the constitutionality of SORNA – particularly when applied within the states – is beyond question . . . , but because the constitutionality of SORNA *as applied to [the defendant]*" remains unaffected by any limitations on Congress's Commerce Clause power that may be found in *NFIB*." *United States v. Robbins*, 2013 WL 4711394, at *1 (2d Cir. Sept. 3, 2013) (emphasis in original). Applying the distinction between regulation of "activity" and "inactivity" from *NFIB*,[4] the Second Circuit in *Robbins* concluded that, as applied to the defendant in that case, SORNA regulated "activity" – "his change of residence and travel across state lines" – and that such activity "directly employ[ed] the channels of interstate commerce." *Id.* at *4.

This case presents closer questions under that analysis. In particular, is it fair to say that Gundy "traveled across state lines" for purposes of this criminal statute and the Commerce Clause given that he was *in custody* when he did so? And in light of his custodial status, was he

[4] The *Robbins* court noted that it is unclear whether the discussion of the Commerce Clause in Chief Justice Roberts' primary opinion in *NFIB* constitutes "more than dicta," *id.* at *4, but assumed for the sake of the argument that the statements about the Commerce Clause in that opinion – including the significance of the activity-inactivity distinction – constitute a holding of the Court when joined with the consistent views of the four dissenting Justices, *id.*

"employ[ing] the channels of interstate commerce" in doing so? As noted, it is unnecessary to resolve those questions here. To the extent that these questions present serious constitutional issues, however, the doctrine of constitutional avoidance provides yet another basis for this Court's interpretation of the statute as applied to this case. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (Brandeis, J., concurring).

III. Conclusion

For the foregoing reasons, the Government's motion for reconsideration is DENIED.

SO ORDERED.

Dated: New York, New York
September 11, 2013

J. PAUL OETKEN
United States District Judge

AO 245B (Rev. 10/15) Judgment in a Criminal Case
Sheet 1

SDNY

UNITED STATES DISTRICT COURT

ELECTRONICALLY FILED

Southern District of New York

DOC #:

DATE FILED: MAY 27 2016

UNITED STATES OF AMERICA
v.
Herman Avery Gundy

JUDGMENT IN A CRIMINAL CASE

Case Number: 13 CR 08 (JPO)

USM Number: 47591-054

Mark Gombiner
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) after a plea of not guilty. One

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 2250	Failure to Report as a Sex Offender	10/31/2012	One

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

5/27/2016
Date of Imposition of Judgment

Signature of Judge

Hon. J. Paul Oetken, U.S.D.J.
Name and Title of Judge

5/27/16
Date

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Time Served

☐ The court makes the following recommendations to the Bureau of Prisons:

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

5 years

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

SPECIAL CONDITIONS OF SUPERVISION

The defendant will register with the state sex offender registration agency in any state where he resides, where he is employed or works, and shall provide proof of registration to the probation officer.

The defendant shall participate in an outpatient substance abuse treatment program approved by the Probation Office, which may include testing to determine whether you have reverted to using drugs or alcohol. The defendant shall contribute to the costs of services rendered based on ability to pay and availability of third-party payment. The Court authorizes the release of available drug treatment evaluations and reports, including the presentence report, to the substance abuse treatment provider.

The defendant shall undergo a sex-offense-specific evaluation and participate in a sex offender treatment and/or outpatient mental health treatment program approved by the probation officer. The defendant shall abide by the rules, requirements, and conditions of the sex offender treatment program, including submission to polygraph testing. The defendant shall waive confidentiality with respect to any records for mental health assessment and treatment imposed as a consequence of this judgment to allow the probation officer to review the course of treatment and progress with the treatment provider. The defendant shall contribute to the costs of services rendered based on the ability to pay or availability of third party payment. The Court authorizes the release of available psychological and psychiatric evaluations and reports, including the presentence investigation report, to the sex offender treatment provider and/or the mental health treatment provider.

The defendant shall report to the nearest Probation Office within 72 hours of the judgment.

The defendant shall be supervised by the district of residence.

The fine is waived because of inability to pay.

The defendant will pay a special assessment in the amount of $100.00

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
[redacted]			
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

JUN 0 1 2016

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA
V.
Herman Avery Gundy

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 13 CR 08 (JPO)
USM Number: 47591-054
Mark Gombiner
Defendant's Attorney

Date of Original Judgment: 5/27/2016
(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☑ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)
- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
- ☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
- ☑ was found guilty on count(s) One after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 2250	Failure to Report as a Sex Offender	10/31/2012	One

The defendant is sentenced as provided in pages 2 through 1 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____
- ☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

6/1/2016
Date of Imposition of Judgment

Signature of Judge

Hon. J. Paul Oetken, U.S.D.J.
Name and Title of Judge

6/1/16
Date

A000068

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Time Served

☐ The court makes the following recommendations to the Bureau of Prisons:

✱ ☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ _____ ☐ a.m. ☐ p.m. on _____ _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ _____ _____ _____ to _____ _____ _____

a _____ _____, with a certified copy of this judgment.

_____ _____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

5 years

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

SPECIAL CONDITIONS OF SUPERVISION

The defendant will register with the state sex offender registration agency in any state where he resides, where he is employed or works, and shall provide proof of registration to the probation officer.

The defendant shall participate in an outpatient substance abuse treatment program approved by the Probation Office, which may include testing to determine whether you have reverted to using drugs or alcohol. The defendant shall contribute to the costs of services rendered based on ability to pay and availability of third-party payment. The Court authorizes the release of available drug treatment evaluations and reports, including the presentence report, to the substance abuse treatment provider

The defendant shall undergo a sex-offense-specific evaluation and participate in a sex offender treatment and/or outpatient mental health treatment program approved by the probation officer. The defendant shall abide by the rules, requirements, and conditions of the sex offender treatment program, including submission to polygraph testing. The defendant shall waive confidentiality with respect to any records for mental health assessment and treatment imposed as a consequence of this judgment to allow the probation officer to review the course of treatment and progress with the treatment provider. The defendant shall contribute to the costs of services rendered based on the ability to pay or availability of third party payment. The Court authorizes the release of available psychological and psychiatric evaluations and reports, including the presentence investigation report, to the sex offender treatment provider and/or the mental health treatment provider.

The defendant shall report to the nearest Probation Office within 72 hours of the judgment.

The defendant shall be supervised by the district of residence.

The fine is waived because of inability to pay.

The defendant will pay a special assessment in the amount of $100.00

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 10/15) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below, or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal (e.g., weekly, monthly, quarterly) installments of $ over a period of (e.g., months or years), to commence (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal (e.g., weekly, monthly, quarterly) installments of $ over a period of (e.g., months or years), to commence (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

AO 245C (Rev. 09/11) Amended Judgment in a Criminal Case (NOTE: Identify Changes with Asterisks (*))
Sheet 1

CLERK FILED
JUN 16 2016

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
V.
Herman

2nd AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 13 CR 08 (JPO)
USM Number: 47591-066*
Mark Gombiner
Defendant's Attorney

Date of Original Judgment: 6/1/2016
(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☑ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)
- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
- ☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
- ☑ was found guilty on count(s) One after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 2250	Failure to Register as a Sex Offender	[redacted]	One

The defendant is sentenced as provided in pages 2 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____
- ☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

6/16/2016
Date of Imposition of Judgment

Signature of Judge

Hon. J. Paul Oetken, U.S.D.J.
Name and Title of Judge

6/16/16
Date

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Time Served

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

5 years

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

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☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

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The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

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1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
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7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
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CASE NUMBER: 13 CR 08 (JPO)

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DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

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[redacted]			

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DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

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D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

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G5RSGUNS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 13 CR 08 (JPO)

HERMAN AVERY GUNDY a/k/a HERMAN GRUNDY,

Defendant.

----------x

New York, N.Y.
May 27, 2016
11:00 a.m.

Before:

HON. J. PAUL OETKEN,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
BRENDAN QUIGLEY
EMIL BOVE
Assistant United States Attorneys

FEDERAL DEFENDERS OF NEW YORK
Attorneys for Defendant
BY: MARK B. GOMBINER

ALSO PRESENT: Megan Hauptman, paralegal

(Case called)

MR. BOVE: Good morning, your Honor. Emil Bove and Brandon Quigley for the government.

THE COURT: Good morning.

MR. GOMBINER: Mark Gombiner, Federal Defenders for Mr. Gundy. And with me at counsel table is Megan Hauptman, who is a paralegal in our office.

THE COURT: Good morning. We are here today for sentencing in this case.

Mr. Gundy was found guilty on March 28 of this year following a bench trial on stipulated facts to one count of failure to register under the Sex Offender Registration and Notification Act, or SORNA, in violation of 18 U.S.C. 2250.

I want to start by going through and making sure I received all the materials I should have. I have reviewed the presentence report with sentencing recommendation dated May 23, and I received letters from defense counsel and from counsel for the government, both dated May 25.

Do I have everything I should have as far as you know?

MR. BOVE: Yes, your Honor.

MR. GOMBINER: Yes, Judge.

THE COURT: Mr. Gombiner, have you read the presentence report and discussed it with your client?

MR. GOMBINER: Yes, I have, Judge.

THE COURT: Mr. Gundy, have you had a chance to read

the presentence report and discuss it with your lawyer?

THE DEFENDANT: Yes.

THE COURT: Mr. Bove, have you read the presentence report?

MR. BOVE: Yes, Judge.

THE COURT: Does anyone have any objections?

MR. GOMBINER: To the guideline calculations, yes, Judge.

THE COURT: Right. The guideline calculation -- and I agree with the points made in the letters, which I think the government does not dispute -- that three points acceptance of responsibility are at least potentially appropriate and I intend to award the three points.

MR. GOMBINER: Other than that, we don't have any objections.

THE COURT: Mr. Bove?

MR. BOVE: I agree with that point about the guidelines, your Honor, and have no objections to the report otherwise.

THE COURT: OK. You have no other objections to the report, Mr. Gombiner?

MR. GOMBINER: No.

THE COURT: I am adopting the facts set forth in the presentence report as my findings of fact.

The starting point, as you know, is the sentencing

guidelines with respect to any sentencing decision in the federal system. The court is no longer required to follow the guidelines, but they are still advisory and they are the starting point in any sentencing decision and provide an important glide post.

Based on the letters of the parties and my review of the guidelines and the presentence report, I differ with the presentence report's guideline calculation with respect to the three-level adjustment for acceptance of responsibility, but I otherwise adopt the guideline calculation.

The base offense level in this case is 16, under Section 2A3.5 of the guidelines. I do find that a three-level downward adjustment is warranted under Section 3E1.1, as explained in comment two, whereas here the defendant did not contest the facts or his factual guilt, but went to trial solely to preserve an issue for appeal and did so on stipulated facts.

The guideline points for acceptance of responsibility may be warranted in an appropriate case, and I find that they are warranted in this case, given that there was a good faith issue that's been argued and is intended to be preserved for appeal, and that is the reason the trial was done with a bench trial on stipulated facts.

I find that the acceptance of responsibility is a three-point downward adjustment and therefore the total offense

level is 13. The defendant's criminal history category is IV, because he had eight points total criminal history points, six from his two prior adult convictions and two under Section 4A1.1(d), because the offense was committed while the defendant was under a criminal justice sentence. Therefore the guideline range is 24 to 30 months.

I'll now give each of you an opportunity to speak. I have read your letters. If there is anything you would like to add, you may.

I'll start with Mr. Gombiner.

MR. GOMBINER: Judge, we would very strongly urge the court to adopt the recommendation of the probation office, which even under the considerably higher guideline range, they had calculated they recommended a sentence of time served. I think that is clearly the appropriate sentence in this case.

Just one thing Mr. Gundy would like to make clear to the court is when he was released from the Bronx Residential Center, he was basically told that they would contact him to let him know when he needed to register, because there was an issue with the fact that he was also required to register in Maryland. So he didn't provide an address to probation, to the residential center, and I think that is where he was arrested. We are not saying that he didn't factually -- we stipulated to that. I don't think that is totally a legal defense, but Mr. Gundy would just like to let the court know that.

Other than that, Mr. Gundy has been in custody now for just about -- I think about 41 months now, maybe 42 months. I think that's enough time. He would like to get back to Maryland and hopefully lead a better life. There wasn't any issues when he -- although he didn't register, there weren't any new issues.

THE COURT: What is the status? Is there still a pending detainer in Maryland?

MR. GOMBINER: I think he got sentenced in Maryland, so some of the time, he's been serving some of the time under the Maryland sentence, I believe, but I think that is about completed now.

THE COURT: Was he out of custody at some point during those 41 months? Because the PSR says he has a two-year-old son.

MR. GOMBINER: There was, I think, a brief period of time that he was out of custody. There may be about six months. But still, he has been in custody for about 35 months, I guess.

I mean, hopefully we don't have to -- it's kind of a confusing situation. I think that's what started this thing in the first place, because there was this confusion about -- maybe confusion isn't the right word -- but there was, I think, some issues as to where he was supposed to be registering and where he was supposed to be living and who was supposed to be

supervising him.

But in any event, putting all that aside, the bottom line is, I think a sentence of time served is definitely warranted here. And I could go on longer, but hopefully I don't need to, unless the court has further questions.

THE COURT: That's fine.

Mr. Bove, is there anything you would like to add?

MR. BOVE: Your Honor, we have identified in our letter, from our perspective, the principal aggravating factors here, which are the defendant's criminal little and risk of recidivism. That is illustrated just to the point that we were just discussing by paragraph 43 of the PSR, which reflects that during the time that the defendant was at liberty during the pendency of this case, that he was rearrested, albeit on a relatively minor charge.

THE COURT: So explain to me, if you can, as I understand it, he was arrested in late 2012. And then was he then transferred to Maryland custody, or what exactly was the narrative here?

MR. BOVE: My understanding is that, following your Honor's ruling in this case, he was then transferred to Maryland custody based on what I understood to be a probation violation or an alleged probation violation arising from the same set of facts.

THE COURT: The failure to register?

MR. BOVE: Yes, your Honor. And then brought back into federal custody pursuant to a writ for purposes of the continued resolution of this case.

Before he made it back up here on the writ, there was a period where he was at liberty, which we did discuss, which did involve this new arrest.

THE COURT: That was here or in Maryland? That's what I was confused by.

MR. BOVE: I think it is in Hagerstown, Maryland, your Honor, based on the PSR. We are looking at paragraph 43 there for that.

MR. GOMBINER: Judge, just to be clear, it was for driving with a suspended license.

THE COURT: Got you.

MR. GOMBINER: When I said he didn't commit, maybe I misspoke technically, but I don't think that's really the kind of behavior we are concerned about. I mean, I am not saying that it is right, but that's not obviously the most heinous of all crimes.

MR. BOVE: I made that point as well, your Honor. It is not a significant arrest. The fact is that there was an arrest, and I was making that objection.

All that said, we are essentially mindful that the defendant has spent a significant amount of time in federal custody relative to the charge and the guidelines range in this

case.

THE COURT: Thank you.

Mr. Gundy, if there is anything you would like to say? You may. You are not required to, but you are welcome to, if you would like.

THE DEFENDANT: Yes.

OK. The last 15 times I have been in front of you, this is the first time I actually get a chance to speak to you. I am going to give you a broad -- so you can understand what just happened in the last four years since 2012 and 2016.

I was sentenced to 20 years all suspended, but for ten for the overall charge. I got out after doing eight years. There's a program that you can go to, a halfway house. You can't ask for this program, you have to be granted these programs in the federal custody. And they can put you in for the programs, they deem you a credible inmate, you're a good model inmate.

I was given this program and went to the halfway house. I went to the halfway house. I completed all of the programs. Two 12-hour days they brought me to a sex offense treatment program that I hook up to monitors and did everything. New York City deemed me not a threat and asked me if I had a reliable address. I gave them the address. I went to this address. I got my birth certificate, Social Security, and my identification and got a job in New York City.

New York City police arrested me because Maryland had a warrant out, because they said I left the halfway house and went to New York. They said I left the federal prison and went to New York City. I never did that. I went from custody to New York City to the halfway house. Maryland didn't know nothing about the halfway house.

So now they arrested me and sent me back to Maryland. When I get back to Maryland, within the same week, the same month, New York City comes and takes me back from Maryland back to New York and charged me with this charge, SORNA. I don't know nothing about SORNA. I did not know I was breaking the law by leaving a halfway house. I thought I was doing something trying to get myself back into society after eight years.

So I didn't realize I was committing a crime by getting on a bus and going to New York City to a halfway house. If I would have did that, at 41 years old, I would not have took the program. I took the program to rehabilitate myself.

OK. Now I am fighting this charge at MDC Brooklyn for eight months. You dismissed this charge. Thank you. You sent me back to Maryland. I go back to Maryland, and I am sentenced for five years for -- they let me out and they rearrested me again and gave me five years' sentence. That's when the baby comes in, the two-year-old son. The five years' sentence they give me for violations.

OK. I take the violation. I am doing my time. This charge comes back up again while I am doing my time, and I am transferred back here again and served seven more months now. So this is 15 months I served in MDC Brooklyn in your custody.

Now I am asking for consideration of what I just went through not knowing what crime that I did commit. If I would have known this, your Honor, I would not have done it. I would not just simply get up and tell them this, I want to go to a halfway house, knowing I am breaking the law. I am not going to do that.

THE COURT: But you know that you're someone who needs to register as a sex offender?

THE DEFENDANT: I never -- I never -- nobody has never taught me this out of eight years being in the state custody. They never sat me down and said okay, this is what you need to do, A, B, C, D. They never did that. They said go to the street and figure it out. They don't have time to tell us nothing in prison. We in prison. So you do what you're supposed to do.

And now, if I had known I had to walk into the police station -- Sara Baumgartel told me, you have to walk into a police station. Now I know. If you let me, I will go to the police. I have no problem with doing that. I follow all rules and regulations. I just didn't know what to do. I gave them the address that they asked me for. I only did what the

government told me to do. I didn't stray off the path. I didn't go anywhere else. I did exactly what I was told to do.

So I am here today asking that you take that into consideration, that I didn't knowingly do this on purpose. This is not something -- I accept full responsibility of what happened, but I didn't do it on purpose, you know.

So thank you.

MR. GOMBINER: Judge, can I just make one observation?

THE COURT: Sure. I'll give you each a chance.

MR. GOMBINER: We are not trying to relitigate the case here, but I just want to inform the court that when we were thinking of going to trial on this case, I just went on the Internet to try to see, well, what do you need to do? How do you register as a sex offender in New York? It is not at all obvious what you are supposed to do or where you are supposed to go.

All right. This is just an observation, it doesn't necessarily pertain directly to this case, but I think, just as an overall thing, it might be helpful if there was some more clear instructions as to -- a clear path as to how you are supposed to accomplish registration as a sex offender in New York.

I mean, he was supposed to register. We are not saying -- we admitted that conduct. We are not backing away from it. I mean, we do think that there are legal issues as to

whether it constitutes a crime, what he did, but --

THE COURT: Look, I agree, it is not the clearest statute. That's why I dismissed the indictment because of the rule of lenity, among other things, because as a person required to register and the travel and interstate commerce, it is not the simplest thing when you just read the statute to figure out what is a violation. I was corrected by the Second Circuit in my interpretation of the statute.

MR. GOMBINER: Right.

THE COURT: And that is what it is.

MR. GOMBINER: We are going to get the Supreme Court to correct the Second Circuit.

In any event, all I am saying is that I think, as a practical matter, at least if you just go on the Internet trying to figure out what to do -- I mean, the prosecutors can try it if they would like -- it is not that easy to figure out what you are supposed to do. That's just goes along with what Mr. Gundy was saying.

THE COURT: Fair enough.

Just going forward, when I get to supervised release, I am going to be clear, as a person required to register, however you feel about the sex offender registration statute, basically, wherever you live, you have to go to a police station and say, I am here to register, tell me how. That is what you have to do.

You understand that now, right?

THE DEFENDANT: Yes.

MR. GOMBINER: That's right. We did figure it out, so that is what he is going to do. And we contend he intends to do that, because there is no question now that, you know, he understands exactly what he needs to do. Thank you.

THE COURT: Thank you.

Mr. Bove.

MR. BOVE: Judge, before we get to the appellate corrections that Mr. Gombiner is going to seek in this case, I think it is important that today's proceeding -- that the record be clarified by the defendant specifically, that the statements he just made were offered in an effort to seek leniency in mitigation from your Honor and that he still abides by the factual stipulations that were the basis for the findings in this case, because those stipulations are arguably intentional, some of the things that were said.

MR. GOMBINER: Judge, I mean, I wasn't really advising we get into this at all, but we are not disputing the factual stipulations that we agreed to. We are not disputing that.

I mean, Mr. Gundy is not a lawyer. You know, he maybe doesn't understand all of the ins and outs of it, but we are not backing away. We stipulated those facts. I reviewed them with Mr. Gundy before we stipulated to them. We are not backing away from those.

Thank you, Judge.

THE COURT: The only other thing I want to be clarified, again, is the number of months he has served. I thought it was 41 months. It seems that there was some period of time when he was out of custody.

Is there an agreement on how many months he has, in fact, served pretrial for this?

MR. GOMBINER: I would say, based on what Mr. Gundy says, I think between 34 and 35 months. He has been in custody since October 2012.

MR. BOVE: Your Honor, if we can just have one second?

THE COURT: Sure.

(Discussion off the record)

MR. BOVE: Your Honor, we estimate that it is approximately 12 months in federal custody, based on the charge in this case, based on first being writted here in approximately December 2012 and then being in custody until approximately May of 2013, around the time that your Honor should find the orders in this case.

After the Circuit's opinion, being writted back here in approximately October of 2015 up until today, we estimate that that is maybe 14, approximately 14 months --

THE COURT: 14 months?

MR. BOVE: -- on the federal.

There is no dispute he was in custody in Maryland for

a period of time on the state-related matters while the appeal was pending.

THE COURT: A time served sentence would be a below guideline sentence is what you're saying?

MR. BOVE: Yes.

THE COURT: Because probation recommends time served, but they say in the presentence report that he has served 41 months. You're saying that is wrong?

MR. BOVE: Yes, that he has not served 41 months.

THE COURT: Mr. Gombiner, would you like to address this? I mean this significantly differs from my understanding of what he has served. 14 months, other than the 14 months in federal custody, the rest of that time was seven months while he was not in custody and everything else was on the Maryland violation?

MR. BOVE: That's our understanding.

THE COURT: Do you know the status of the Maryland violation? Is that pending?

MR. GOMBINER: My understanding is that Mr. Gundy, once he completes his federal sentence, he is going to essentially have completed his Maryland sentence, too, that he is going to have to go back to Maryland. So I think even if you impose a sentence of time served, he is not going to get released immediately. I think he is going to have to go back, and which is going to make his sentence longer, he is going to

have to go back to Maryland. I think once he gets back there, I am relying on what Mr. Gundy tells me, but he believes that he will then have pretty much completed his Maryland sentence.

THE COURT: The Maryland sentence is a violation of probation for driving without a license?

THE DEFENDANT: Yes, basically. Yes.

THE COURT: Is that your understanding, counsel for the government?

MR. BOVE: If we can have one second again, your Honor?

THE COURT: Sure.

(Discussion off the record)

MR. BOVE: There are two potential violations of probation here, one related to the sex offense and one relating to the arrest we discussed today. It is not clear to us which of those is still pending and is providing the relevant sentence that he is still in custody on.

THE COURT: Look, one way or another, he has served 41 months, and a large part of that was for this case. It is a long time. The guidelines, bottom of the guidelines, are 24 months.

Does the government have any objection to a time served sentence in this case?

MR. BOVE: I think the office's official position your Honor is well aware with. As we said, we are mindful of the

amount of time the defendant spent in custody one way or another related to this set of facts.

THE COURT: Anything you want to add, Mr. Gombiner?

MR. GOMBINER: No. Hopefully not, no.

THE COURT: Let me just ask, I am inclined to impose a time served sentence in this case. I'll explain that in a minute. The conditions of supervised release, I was going to impose a five-year term of supervised release, which appears to be both the guidelines and the statutory term of supervised release.

Does anyone want to comment on the specific conditions recommended by probation, which include a special condition of drug treatment and testing, as well as a sex offense evaluation and sex offender treatment or mental health program?

MR. GOMBINER: Judge, we don't have any objections to those. I think those could be appropriate. I mean, I don't see how they can really hurt him.

THE COURT: Do you have anything to add?

MR. BOVE: No, your Honor.

THE COURT: Is there any reason sentence may not be imposed at this point?

MR. GOMBINER: No, Judge.

THE COURT: In preparing the sentence, Mr. Gundy, I have considered the presentence report, the recommendation of probation, which does recommend time served, and five years of

supervised release, the written and oral statements of defense counsel, the defendant, and the government, and I have considered each of the factors set forth in the statute that governs my decision, which is 18 U.S.C. 3553(a).

Those include the nature and circumstances of the offense, the defendant's history and characteristics, the purposes of sentencing, which include the need to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment, to afford adequate deterrence to criminal conduct, and to protect the public.

Also, I need to consider the guidelines, which are the starting point, as I mentioned, and the kinds of sentences available and the need to avoid unwarranted sentencing disparities among similar defendants.

I am ultimately required to impose a sentence that is sufficient but not greater than necessary to comply with the purposes in the statute. Starting with the nature and circumstances of the offense, what Mr. Gundy is being sentenced for is a SORNA violation, a failure to register after traveling in interstate commerce. Congress adapted SORNA in order to strengthen the registration requirements who apply to people who have been convicted of sex offenses, specifically to prevent people from falling through the cracks when traveling between states and failing to register in a new state.

As noted in my earlier decision dismissing the

indictment, I did not think that the statute was particularly clear in its application to a person in Mr. Gundy's situation, who had traveled to a halfway house from Pennsylvania to New York and was technically in custody at the time of his interstate travel. However, the Court of Appeals determined that the statute does apply in that situation, and congress has determined that this is a felony that should be treated seriously, and that is why the guidelines are what they are.

Mr. Gundy is a 41-year-old man who has several prior convictions over the course of many years, including illegal drug convictions on the underlying sex offense for which he was required to register, which is a serious one. I will note that there is a certain amount of confusion in the scheme of sex offender registration statutes. I don't think, ultimately, that provides a defense. I think that the conviction in this case was correct based on the stipulated facts and that I did confirm that those facts were true and that the defendant understood them.

Nevertheless, I do understand Mr. Gundy's comments today as pointing to the confusing nature in certain circumstances of what a defendant faces in these situations. I think sometimes the sex offender's requirements work in such a way that after someone has served time, they end up in this cycle of going back for failing to register for an underlying offense, and it can be intentioned with the goals of getting a

fresh start in your life and trying to lead a law-abiding life.

However, given all the circumstances, the purposes of sentencing, and given the application of the statute here, I believe it does apply, and for the reasons I have explained and the defendant's criminal history, I do believe that the purposes of general deterrence, specific deterrence, and protecting the public make a guideline sentence appropriate here. And by guideline sentence, I mean a 24-month sentence.

Therefore, that's ordinarily the sentence I would impose here is a sentence of 24 months. However, Mr. Gundy has served 41 months. I realize that technically the amount in federal custody pursuant to the statute, pursuant to the charge here, may have been approximately 14 months, but part of the reason that it wasn't longer than that was because I dismissed the indictment and was overturned.

Also, that there was a Maryland violation of probation, one more, a minor offense of driving without a license, and potentially also for the same violation here. In other words, there was significant overlap, I believe. So I believe that you should get credit for at least a portion of the 41 months, to the point where a sentence of time served is appropriate here in light of the purposes of sentencing and the other considerations in the statute.

So I intend to impose a sentence of time served followed by five years of supervised release, as recommended by

probation. I would like to ask defense counsel if you have any objection or know of any legal reason why that sentence may not be imposed?

MR. GOMBINER: No, your Honor.

THE COURT: The same sentence for counsel for the government?

MR. BOVE: No, your Honor.

THE COURT: Mr. Gundy, please stand.

It is the judgment of this court that you be sentenced to incarceration for a period of time already served. Following release you will be placed on supervised release for a period of five years with the following conditions:

You will not commit another federal, state or local crime; you will not possess a illegal controlled substance; you will not possess a firearm or destructive device; the mandatory drug testing condition is suspended because I am imposing a special condition of treatment and testing; you will cooperate in the collection of DNA as directed by probation; you will register with the state Sex Offender Registration Agency in any state where you reside, where you are employed or work; and shall provide proof of registration to the probation officer.

And let me just reiterate, Mr. Gundy, when in doubt, whenever you move to a new state, please do just check in with the police and make sure you're registered. Otherwise, these violations continue to happen. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: The standard conditions 1 through 13 are imposed with the following special conditions: You shall participate in an outpatient substance abuse treatment program approved by probation, which may include testing to determine whether you have reverted to the use of drugs. You shall contribute to the cost of services rendered based on ability to pay and availability of third-party payment. I am authorizing the release of available drug treatment evaluations and reports, including the presentence report, to the substance abuse provider, treatment provider. You shall undergo a sex offense specific evaluation and participate in a sex offender treatment and/or outpatient mental health treatment program approved by the probation officer. You shall abide by the rules, requirements, and conditions of the sex offender treatment program, including submission to polygraph testing. You shall waive confidentiality with respect to any records for mental health assessment and treatment imposed as a consequence of this judgment or to allow the probation officer to review the course of treatment and progress with the treatment provider. You shall contribute to the costs of services rendered based on ability to pay and availability of third-party payment. And I am authorizing the release of available psychological and psychiatric evaluations and reports, including the presentence report to the sex offense

treatment provider or mental health treatment provider. You shall report to the nearest probation office within 72 hours of the filing of the judgment. You shall be supervised by the district of your residence.

There will be no fine because I find you are unable to pay one. However, there is a mandatory $100 special assessment, which is due immediately.

Mr. Gundy, you have the right to appeal from your conviction and sentence. If you're unable to pay the costs of an appeal, you may apply for leave to appeal *in forma pauperis*. Any appeal must be filed within 14 days of the filing of judgment of conviction.

I am directing that a complete copy of the presentence report be provided to the Bureau of Prisons and sentencing commission. Counsel on appeal will have access to the report. The clerk will prepare the judgment and see to it that required documentation is sent to the sentencing commission.

There are no underlying counts to be dismissed, are there?

MR. BOVE: No, your Honor.

THE COURT: Is there anything further?

MR. GOMBINER: No, Judge. Thank you very much. Thank you.

THE COURT: Thank you.

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No. 17-6086

IN THE SUPREME COURT OF THE UNITED STATES

HERMAN AVERY GUNDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Section 2250(a) of Title 18 of the United States Code imposes criminal penalties on a person who "is required to register under the Sex Offender Registration and Notification Act" (SORNA), 34 U.S.C. 20901 et seq., "travels in interstate or foreign commerce," and "knowingly fails to register or update a registration as required by" SORNA. 18 U.S.C. 2250(a). The questions presented are as follows:

1. Whether petitioner was "required to register" under SORNA prior to completing his term of imprisonment for the state-law criminal offense that gave rise to his obligation to register.

2. Whether petitioner traveled in interstate commerce for purposes of Section 2250(a) when, after the Bureau of Prisons granted his request to be transferred from a federal prison in Pennsylvania to a halfway house in New York, he traveled unescorted by commercial bus across state lines.

3. Whether SORNA's delegation of authority to the Attorney General to issue regulations under 34 U.S.C. 20913(d) violates the nondelegation doctrine.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is not published in the Federal Reporter but is reprinted at 695 Fed. Appx. 639. A prior opinion of the court of appeals (Pet. App. A5-A26) is reported at 804 F.3d 140. The relevant opinions and orders of the district court (Pet. App. A27-A49, A50-A61) are not published in the Federal Supplement but are available at 2013 WL 4838845 and 2013 WL 2247147.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2017. The petition for a writ of certiorari was filed on September

20, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of failing to register as a sex offender after traveling in interstate commerce, in violation of 18 U.S.C. 2250(a). Pet. App. A2, A68. Petitioner was sentenced to time served and five years of supervised release. Id. at A69-A70. The court of appeals affirmed. Id. at A1-A4.

1. Since at least 1996, all 50 States and the District of Columbia have had sex-offender-registration laws. See Smith v. Doe, 538 U.S. 84, 90 (2003). On July 27, 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), 34 U.S.C. 20901 et seq. (formerly codified at 42 U.S.C. 16901 et seq.), which "establishe[d] a comprehensive national system for the registration of [sex] offenders." 34 U.S.C. 20901.[1]

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[1] Effective September 1, 2017, after the court of appeals issued its decision in this case, SORNA's provisions previously codified at 42 U.S.C. 16901 et seq. were reorganized and recodified as 34 U.S.C. 20901 et seq.; the statutory text was not changed. U.S. House of Representatives, Office of the Law Revision Counsel, Editorial Reclassification: Title 34, United States Code, http://uscode.house.gov/editorialreclassification/t34/index.html. A table listing the original section numbers in Title 42 and the corresponding new section numbers in Title 34 is available at http://uscode.house.gov/editorialreclassification/t34/T34ERT.pdf.

SORNA provides that every "sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 34 U.S.C. 20913(a). SORNA defines a "sex offender" as "an individual who was convicted of a sex offense" that falls within the statute's defined offenses. 34 U.S.C. 20911(1); see 34 U.S.C. 20911(5)-(7). As pertinent here, the term "sex offense" includes, inter alia, "specified offense[s] against a minor." 34 U.S.C. 20911(5)(A)(ii). The term "specified offense against a minor" means "an offense against a minor that involves any" of several enumerated acts, including "[c]riminal sexual conduct involving a minor" and "[a]ny conduct that by its nature is a sex offense against a minor." 34 U.S.C. 20911(7).

SORNA establishes deadlines by which sex offenders subject to the registration requirement must register and update their registration. 34 U.S.C. 20913(b) and (c). The statute provides that a sex offender "shall initially register * * * before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement." 34 U.S.C. 20913(b)(1). "[I]f the sex offender is not sentenced to a term of imprisonment," then the sex offender "shall initially register * * * not later than 3 business days after being sentenced for that offense." 34 U.S.C. 20913(b)(2). Thereafter, "[a] sex offender shall, not later than 3 business days after each change

of name, residence, employment, or student status, appear in person in at least 1 jurisdiction" where the offender resides, is an employee, or is a student, and shall "inform that jurisdiction of all changes in the information required for that offender in the sex offender registry." 34 U.S.C. 20913(c).

SORNA authorized the Attorney General "to specify the applicability of the requirements of [SORNA] to sex offenders convicted before [SORNA's] enactment" in 2006 "or its implementation in a particular jurisdiction." 34 U.S.C. 20913(d); see also Reynolds v. United States, 565 U.S. 432, 439 (2012) (explaining that sex offenders convicted of sex offenses before SORNA's enactment were not "require[d] * * * to register before the Attorney General validly specif[ied] that the Act's registration provisions appl[ied] to them"). The statute further authorized the Attorney General to prescribe "rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with" the default statutory registration deadlines in Section 20913(b). 34 U.S.C. 20913(d).

On February 28, 2007, pursuant to that authority, the Attorney General issued an interim rule, effective on that date, specifying that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. 72.3. In 2010, the Attorney General promulgated a final

rule that "finaliz[ed] [the] interim rule" with minor modifications. See 75 Fed. Reg. 81,849, 81,850 (Dec. 29, 2010). In addition, in 2008, after notice and comment, the Attorney General -- in coordination with the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking -- promulgated guidelines for the States and other jurisdictions on matters of SORNA's implementation. See 73 Fed. Reg. 38,030 (July 2, 2008) (Final Guidelines). The Final Guidelines reaffirmed SORNA's application to all sex offenders. Id. at 38,035-38,036, 38,046, 38,063.

To enforce SORNA's registration requirements, Congress created a federal criminal offense penalizing nonregistration. See 18 U.S.C. 2250(a). As relevant here, Section 2250(a) provides that a person who "is required to register under [SORNA]," who "travels in interstate or foreign commerce," and who "knowingly fails to register or update a registration as required by [SORNA] shall be fined under this title or imprisoned not more than 10 years, or both." Ibid. This Court has held that, "[f]or a defendant to violate [Section 2250(a)], * * * the statute's three elements must be satisfied in sequence." Carr v. United States,

560 U.S. 438, 446 (2010) (citation and internal quotation marks omitted).[2]

2. a. In 1994, petitioner pleaded guilty in the U.S. District Court for the Eastern District of Pennsylvania to one count of conspiracy to distribute cocaine base, in violation of 21 U.S.C. 846. Pet. App. A27. In 1996, he was sentenced to five years of imprisonment, to be followed by five years of supervised release. Ibid. In 2004, jurisdiction over petitioner's supervised release was transferred to the District of Maryland. Ibid.

In October 2004, while petitioner was serving his federal term of supervised release on his 1994 federal drug conviction, petitioner gave cocaine to an 11-year-old girl and then raped her. Pet. App. A12-A13; Gov't C.A. Br. 3 (No. 16-1829); D. Ct. Doc. 16-2, at 9-12 (Mar. 22, 2013). In October 2005, petitioner entered a nolo contendere plea in Maryland state court and was convicted of sexual offense in the second degree, in violation of Maryland Criminal Law § 3-306 (2002). Pet. App. A12, A27. The Maryland court sentenced petitioner to 20 years of imprisonment (with ten years suspended), to be followed by five years of probation. Ibid.

Petitioner's Maryland state-court conviction also violated a condition of his federal supervised release for his federal drug

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[2] The Attorney General's final rule promulgated in 2010 made "minor changes" in one of the examples provided in the interim rule "to avoid any arguable inconsistency with" this Court's decision in Carr. 75 Fed. Reg. at 81,853.

conviction. Pet. App. A13. Petitioner pleaded guilty to the supervised-release violation. Ibid. The federal court accordingly revoked petitioner's supervised release and ordered him to serve 24 months of imprisonment, to run consecutively to his Maryland state sentence. Ibid.

b. On November 30, 2010, petitioner completed the custodial portion of his Maryland state sentence for his 2005 sex-offense conviction; he was transferred to federal custody in Maryland to serve the 24-month revocation sentence, though he temporarily remained in a Maryland state facility. Pet. App. A13, A17, A52; C.A. App. A119, A217; D. Ct. Doc. 34, at 5 & n.3 (May 31, 2013). In 2011, the Bureau of Prisons transferred petitioner to a federal correctional facility in Pennsylvania. Pet. App. A13, A28; D. Ct. Doc. 34, at 5.

In March 2012, while petitioner was serving his term of imprisonment for his federal supervised-release revocation, he applied to serve the remaining portion of that term in a halfway house. Pet. App. A13; C.A. App. A220. The application was granted, and petitioner signed a "Community Based Program Agreement" that contemplated that he would become "a resident" of a "residential reentry center or work release program." C.A. App. A220. In June 2012, petitioner signed a "Furlough Application" requesting a furlough to enable him to travel from the federal prison in Pennsylvania to his designated halfway house, the Bronx

Residential Re-entry Center in New York. C.A. App. A124. Petitioner's furlough request was approved, and in July 2012, the Bureau of Prisons granted petitioner a furlough to travel unescorted on a commercial bus from Pennsylvania to the Bronx facility in New York. Pet. App. A2, A13-A14; C.A. App. A124-A126.

On July 17, 2012, petitioner traveled by bus from Pennsylvania to New York as authorized. Pet. App. A14. On August 27, 2012, he was released from the halfway house to a private residence in the Bronx. Id. at A2. Petitioner did not register as a sex offender either in Maryland or in New York as required by state law. Ibid.

3. a. In January 2013, a grand jury returned an indictment against petitioner for one count of failing to register as a sex offender, in violation of 18 U.S.C. 2250. Pet. App. A14; C.A. App. A24. The indictment alleged that petitioner "traveled from Pennsylvania to New York and thereafter resided in New York without registering as a sex offender in New York." C.A. App. A24.

Petitioner moved to dismiss the indictment, arguing "principally that he was required to register only after the alleged interstate travel between Pennsylvania and New York, and thus could not have violated § 2250(a), the elements of which must be satisfied sequentially." Pet. App. A15. The district court agreed and granted the motion. Id. at A27-A49.

b. The government appealed, and the court of appeals reversed. Pet. App. A5-A26. The court of appeals explained that "[a] person is 'required to register' under SORNA 'once that person becomes subject to SORNA's registration requirements.'" Id. at A18 (brackets omitted) (quoting Carr, 560 U.S. at 447). Because petitioner was "convicted of a sex offense in 2005, before SORNA's July 2006 effective date, the registration requirements attached at the latest on August 1, 2008," when the Attorney General's Final Guidelines making SORNA's registration requirements applicable to pre-SORNA sex offenders became effective. Ibid.[3]

The court of appeals rejected petitioner's contention that, because SORNA provides that a sex offender "shall initially register * * * before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement," 34 U.S.C. 20913(b)(1), petitioner was not required to register "until shortly before his 2012 release from federal custody." Pet. App. A18. "[T]he core registration mandate," the court noted, is contained within Section 20913(a). Id. at A10. The court explained that Section 20913(b), by contrast, "set[s] deadlines for initial registration" but does not "regulate[] when

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[3] Although "[t]he guidelines themselves identify their 'Effective Date' as July 2, 2008, the date they were published in the Federal Register," the court of appeals explained that, under 5 U.S.C. 553(d) and consistent with the government's concession below, the actual effective date is August 1, 2008. Pet. App. A12 n.4.

registration requirements attach" or "establish the conditions that make registration mandatory." Id. at A18-A19. The court observed that Section 20913(b) "is worded in terms of cutoff dates rather than beginning points." Id. at A19. The court further explained that "§ 2250(a) treats being 'required to register' and 'failing to register or update a registration as required' as separate and distinct elements of the criminal offense." Ibid. (brackets omitted) (quoting 18 U.S.C. 2250(a)(1) and (3)). The court also found unpersuasive petitioner's arguments that its reading was inconsistent with SORNA's purposes and this Court's decision in Carr. Id. at A20-A25. Petitioner did not seek rehearing or certiorari.

4. a. On remand, after a bench trial on stipulated facts, the district court convicted petitioner of violating 18 U.S.C. 2250(a). Pet. App. A2-A3. It rejected petitioner's argument that Section 2250(a)'s interstate-travel requirement was not satisfied by his travel while in federal custody. See C.A. App. A205-A207. The court also rejected petitioner's contention that SORNA's authorization to the Attorney General to specify SORNA's application to pre-SORNA offenders violates the nondelegation principle. Id. at A204-A205. The court sentenced petitioner to time served and five years of supervised release. Pet. App. A69-A70.

b. The court of appeals affirmed. Pet. App. A1-A4. The court noted that it had held in the prior appeal that petitioner satisfies Section 2250(a)'s first element -- the requirement to register under SORNA, 18 U.S.C. 2250(a)(1). Pet. App. A3. It further noted that "[t]here is no dispute that he knowingly failed to register, thus satisfying the third requirement." Ibid.

Petitioner argued that Section 2250(a)'s interstate-travel element -- that a sex offender required to register has "travel[ed] in interstate * * * commerce," 18 U.S.C. 2250(a)(2)(B) -- is not satisfied where a defendant "crosses state lines while in federal custody," in light of "the usual requirement of criminal law that criminal acts be committed voluntarily." Pet. App. A3. The court "decline[d] to reach [petitioner's] argument regarding the interpretation of § 2250(a)" because it determined that, even "[a]ssuming arguendo that [petitioner] is correct and that the travel element contains an implicit voluntariness requirement, that requirement is easily met on the facts of this case." Id. at A4. The court determined that "the stipulated facts at trial" -- including that petitioner "made the trip in question willingly, as he authorized the initial transfer process and then traveled by bus to New York on his own recognizance" -- "are sufficient to support the District Court's finding that [petitioner's] travel was voluntary." Ibid.

Petitioner also argued that SORNA's authorization to the Attorney General to specify SORNA's application to pre-SORNA offenders violates the nondelegation principle, but the court of appeals explained that the argument was "foreclosed" by circuit precedent. Pet. App. A4 n.2 (citing United States v. Guzman, 591 F.3d 83, 91-93 (2d Cir. 2010)).

ARGUMENT

Petitioner contends (Pet. 7-17) that the court of appeals erred in affirming his conviction for failing to register as a sex offender under SORNA after traveling in interstate commerce because he was not "required to register" while in custody and because his voluntary transfer to a halfway house across state lines did not constitute "travel[] in interstate * * * commerce." 18 U.S.C. 2250(a)(1) and (2)(B). He further contends (Pet. 17-19) that SORNA improperly delegates legislative authority to the Attorney General. The court of appeals' decision affirming petitioner's conviction is correct and does not conflict with any decision of this Court or another court of appeals, and this case is not a suitable vehicle to address the issues petitioner raises. Further review is not warranted.

1. As relevant here, Section 2250(a) imposes criminal liability on a person who "is required to register under" SORNA, "travels in interstate * * * commerce," and "knowingly fails to register or update a registration as required by" SORNA. 18 U.S.C.

2250(a). "For a defendant to violate this provision, * * * the statute's three elements must be satisfied in sequence, culminating in a post-SORNA failure to register." Carr v. United States, 560 U.S. 438, 446 (2010) (citation and internal quotation marks omitted). Petitioner argues (Pet. 7-14) that he was not "required to register under [SORNA]," 18 U.S.C. 2250(a)(1), when he traveled across state lines in July 2012 because the statutory deadline for "initially register[ing]" as a sex offender, 34 U.S.C. 20913(b), did not occur until he completed his federal supervised-release-revocation sentence in August 2012. Petitioner's argument is incorrect, and he identifies no court of appeals that would have accepted it.

a. The court of appeals correctly determined in the prior appeal that because petitioner had committed a sex offense before SORNA's enactment, he became "required to register under [SORNA]," 18 U.S.C. 2250(a)(1), when SORNA's registration requirements were made applicable to him, no later than August 2008 -- before his interstate travel -- not when the deadline for complying with those registration requirements passed. Pet. App. A13-A22.

This Court held in Carr that a person is "required to register" under Section 2250(a)(1) "when [he] becomes subject to SORNA's registration requirements." 560 U.S. at 446; see Pet. App. A18. SORNA imposes a registration requirement on all sex offenders to whom the statute applies. 34 U.S.C. 20913(a).

Section 20913(a) provides that "[a] sex offender shall register, and keep the registration current," as provided in the statute. Ibid. Petitioner committed a covered sex offense before SORNA's effective date. Pet. App. A18. Thus, as the court of appeals explained, "the registration requirements attached" in this case when petitioner "'bec[a]me[] subject to SORNA's registration requirements,'" i.e., when those requirements were made applicable to pre-SORNA offenders including petitioner. Ibid. (citation omitted). That occurred "at the latest on August 1, 2008," when the Attorney General's Final Guidelines applying SORNA to pre-Act offenders took effect. Ibid.; see, e.g., United States v. Whitlow, 714 F.3d 41, 42-48 (1st Cir.) (defendant was "required to register" for pre-SORNA conduct on August 1, 2008, when the final guidelines took effect), cert. denied, 134 S. Ct. 287 (2013); United States v. Trent, 654 F.3d 574, 585 (6th Cir. 2011) ("All sex offenders whose interstate travel and failure to register occurred after August 1, 2008, are required to register under the Act."), cert. denied, 565 U.S. 1228 (2012).

Petitioner contends (Pet. 9-14) that he was not "required to register" within the meaning of 18 U.S.C. 2250(a)(1) until the statutory deadline for registration had passed. Section 20913(b)(1) provides that sex offenders who are serving a term of imprisonment for a sex offense "shall initially register * * * before completing a sentence of imprisonment with respect to the

offense giving rise to the registration requirement." 34 U.S.C. 20913(b)(1). Petitioner argues (Pet. 9, 12) that this deadline for registering "dictates when an offender is 'required to register under' SORNA, as that phrase is used in § 2250(a)," and that petitioner had no duty to register "until shortly before the end of [his] sentence of imprisonment." The court of appeals correctly rejected that argument. Pet. App. A18-A20. As it explained, Section 20913(b) "does not regulate when registration requirements attach," but when they are violated. Id. at A20. "The provision is worded in terms of cutoff dates rather than beginning points." Id. at A19. The duty to register is established by Section 20913(a), which "contains the core registration mandate," and which is not contingent on or tied to the completion of a term of imprisonment. Id. at A10.

As the court of appeals further explained, petitioner's view -- which equates when a sex offender is "required to register under [SORNA]" with the expiration of the registration period -- is inconsistent with Section 2250(a). Pet. App. A19. That provision "treats being 'required to register' and 'failing to register or update a registration as required' as separate and distinct elements." Ibid. (brackets omitted). As the court further noted, "[t]he temporal relationship between these elements" as construed by this Court in Carr reinforces this conclusion: under Carr, the element of being required to register "necessarily is satisfied

before" the element of failing to register. Ibid. It follows that "a person can be 'subject to SORNA's registration requirements' before he or she is subject to immediate sanction for 'failing to register.'" Id. at A19-A20 (brackets and citations omitted). Petitioner's reading conflates those separate elements and in doing so fundamentally alters the statute. On petitioner's view, instead of making it an offense for a sex offender who is required to register and travels in interstate commerce to fail to register, Section 2250(a) would make it an offense only for a sex offender who has already defaulted on his duty to register -- i.e., for whom the registration deadline has already passed -- and then travels in interstate commerce to continue to fail to register.

b. Even if petitioner were correct that a sex offender is not "required to register" until the deadline for registering set forth in Section 20913 passes, it would not affect petitioner's conviction because the deadline for petitioner to register did pass -- and he therefore was required already to have registered -- before his interstate travel. SORNA provides that a person must "initially register" "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement," if a term of imprisonment was imposed for that offense. 34 U.S.C. 20913(b)(1). The offense that "g[ave] rise" to the registration requirement here was petitioner's Maryland state-court sex offense, and petitioner "complet[ed] a

sentence of imprisonment with respect to th[at] offense" (ibid.) in November 2010 -- more than a year before he traveled across state lines in July 2012. See pp. 6-7, supra.

Petitioner acknowledges (Pet. 12) that he was required to register "shortly before the end of [his] sentence of imprisonment." He nevertheless argues, without explanation or citation of authority, that the relevant "sentence of imprisonment" is his federal sentence imposed upon revocation of his supervised release. See ibid. (asserting that "he was not required to register until August 2012, shortly before his release from custody"). That supervised-release-revocation sentence, however, is not a sentence "with respect to the offense giving rise to the registration requirement." 34 U.S.C. 20913(b)(1). Petitioner is a "sex offender" subject to SORNA's registration requirements because he "was convicted of a sex offense," 34 U.S.C. 20911(1), not because he violated the conditions of supervised release imposed for a separate drug offense. Petitioner would be subject to SORNA irrespective of whether his supervised release was revoked. Indeed, a supervised-release-revocation sentence is a sentence attributable to the "original conviction," here, petitioner's 1994 federal drug conviction, not his 2005 Maryland sex-offense conviction. See Johnson v. United States, 529 U.S. 694, 701 (2000) ("We therefore attribute postrevocation penalties

to the original conviction."); ibid. ("postrevocation penalties relate to the original offense").

Because the court of appeals held that petitioner was required to register when SORNA was made applicable to him, irrespective of when the deadline for registering occurred, it did not directly address the government's alternative argument that, even if petitioner was required to register only when Section 20913(b)'s registration deadline passed, that deadline passed when petitioner completed his term of imprisonment on his Maryland sex offense in November 2010, long before his interstate travel. But the fact that petitioner did not register before completing the term of imprisonment for his Maryland sex-offense conviction provides an alternative ground for affirming the court of appeals' decision, irrespective of the answer to the question petitioner raises of whether SORNA's registration requirements can attach while a sex offender is still in custody for the offense that gives rise to the registration requirement. At a minimum, this additional ground would make this case a poor vehicle to address that question.

2. Petitioner separately contends (Pet. 14-17) that only voluntary, noncustodial travel can satisfy the interstate-travel element of Section 2250(a)(2)(B), and that his transportation from Pennsylvania to New York does not qualify. Petitioner again identifies no court of appeals that has adopted his proposed interpretation of the statute. And the court of appeals expressly

"decline[d] to reach [petitioner's] argument regarding the interpretation of § 2250(a)" because it would not affect the outcome of this case. Pet. App. A4.

As the court of appeals explained, "even assuming [petitioner] is correct that interstate travel in § 2250(a) is limited to voluntary travel, the District Court reasonably found that the travel here was voluntary." Pet. App. A4; see ibid. ("Assuming arguendo that [petitioner] is correct and that the travel element contains an implicit voluntariness requirement, that requirement is easily met on the facts of this case.").

The voluntariness question petitioner raises thus is not properly presented because the court of appeals held that petitioner's challenge to his conviction would fail even under the interpretation he proposed. Petitioner does not appear to challenge in this Court the court of appeals' determination that "the District Court reasonably found that the travel here was voluntary" under the circumstances here -- which included that petitioner "made the trip in question willingly, as he authorized the initial transfer process and then traveled by bus to New York on his own recognizance" and unescorted. Pet. App. A4. In any event, that factbound determination does not warrant this Court's review. See Sup. Ct. R. 10.

To the extent petitioner argues that Section 2250(a)(2)(B)'s interstate-travel element contains an implicit categorical

exception for all custodial travel, voluntary or otherwise, the court of appeals also correctly declined to adopt that argument. Pet. App. A4 n.1. The court was "unpersuaded" by petitioner's "attempt[] to present his case as two separate arguments -- one based on voluntariness, and one based on a lack of congressional 'focus' on sex offenders in custody (supporting the creation of a per se custodial travel exemption)." Ibid. "[Petitioner] himself," the court noted, "repeatedly blend[ed] these arguments, and he provide[d] [the court] with no real reason to look past the statute's text to other expressions of congressional intent except for his stated concern about the voluntariness of custodial travel." Ibid. (citation omitted). Likewise, in this Court, petitioner's argument that custodial travel does not satisfy Section 2250(a)(2)(B) rests on his contention that the statute requires voluntary travel. See, e.g., Pet. 16 (arguing that "custodial movement cannot give rise to criminal liability because such movement is not truly voluntary"). At a minimum, the court of appeals' determination that petitioner had not presented a meaningfully distinct custodial-travel argument on appeal, and the absence of any ruling by the court of appeals on such an argument, makes this case a poor vehicle to address it.

3. Finally, petitioner contends (Pet. 17-19) that SORNA's delegation of authority to the Attorney General to specify the applicability of SORNA's requirements to pre-SORNA sex offenders

under 34 U.S.C. 20913(d) violates the nondelegation doctrine. Every court of appeals to decide such a nondelegation challenge to SORNA has rejected it -- ten of them in published decisions and one in multiple unpublished decisions. See, e.g., Pet. App. A4 n.2 (citing United States v. Guzman, 591 F.3d 83, 91-93 (2d Cir.), cert. denied, 561 U.S. 1019 (2010)); United States v. Nichols, 775 F.3d 1225, 1231-1232 (10th Cir. 2014), rev'd on other grounds, 136 S. Ct. 1113 (2016); United States v. Richardson, 754 F.3d 1143, 1145-1146 (9th Cir. 2014) (per curiam); United States v. Cooper, 750 F.3d 263, 266-272 (3d Cir.), cert. denied, 135 S. Ct. 209 (2014); United States v. Goodwin, 717 F.3d 511, 516-517 (7th Cir.), cert. denied, 134 S. Ct. 334 (2013); United States v. Kuehl, 706 F.3d 917, 918-920 (8th Cir. 2013); United States v. Parks, 698 F.3d 1, 7-8 (1st Cir. 2012), cert. denied, 133 S. Ct. 2021 (2013); United States v. Felts, 674 F.3d 599, 606 (6th Cir. 2012); United States v. Whaley, 577 F.3d 254, 262-264 (5th Cir. 2009); United States v. Ambert, 561 F.3d 1202, 1212-1214 (11th Cir. 2009); see United States v. Sampsell, 541 Fed. Appx. 258, 259 (4th Cir. 2013) (per curiam) (noting that the Fourth Circuit has "consistently rejected similar non-delegation challenges in unpublished decisions").

This Court has repeatedly denied petitions for writs of certiorari raising the same nondelegation claim. See Nichols v. United States, 136 S. Ct. 445 (2015) (No. 15-5238) (limiting grant

of certiorari to the first question presented and thereby excluding review of nondelegation challenge); see, e.g., Hill v. United States, 137 S. Ct. 829 (2017) (No. 16-6049); Harges v. United States, 135 S. Ct. 507 (2014) (No. 14-6748); Stacey v. United States, 135 S. Ct. 419 (2014) (No. 14-6321); Crosby v. United States, 135 S. Ct. 390 (2014) (No. 14-6167); Cooper v. United States, 135 S. Ct. 209 (2014) (No. 14-5174); Atkins v. United States, 134 S. Ct. 56 (2013) (No. 12-9062); Mitchell v. United States, 133 S. Ct. 2854 (2013) (No. 12-8807); Parks v. United States, 133 S. Ct. 2021 (2013) (No. 12-8185); Clark v. United States, 133 S. Ct. 930 (2013) (No. 12-6067); Rogers v. United States, 133 S. Ct. 157 (2012) (No. 11-10450); Yelloweagle v. United States, 566 U.S. 964 (2012) (No. 11-7553); Johnson v. United States, 565 U.S. 834 (2011) (No. 10-10330); May v. United States, 556 U.S. 1258 (2009) (No. 08-7997); see also Beasley v. United States, 562 U.S. 801 (2010) (No. 09-10316) (granting the petition for a writ of certiorari, vacating judgment, and remanding to the court of appeals for further consideration in light of Carr, supra; thereby excluding review of nondelegation challenge). There is no reason for a different outcome here.

This Court's decisions recognize that the nondelegation doctrine is satisfied when a statutory grant of authority sets forth an "intelligible principle" that "clearly delineates the general policy, the public agency which is to apply it, and the

boundaries of this delegated authority." Mistretta v. United States, 488 U.S. 361, 372-373 (1989) (citations omitted). As the Court has repeatedly observed, it has found only two statutes that lacked the necessary "intelligible principle" -- and it has not found any in the last 80 years. Whitman v. American Trucking Ass'ns, 531 U.S. 457, 474 (2001) (referring to A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), and Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935)); see Loving v. United States, 517 U.S. 748, 771 (1996) (same); Mistretta, 488 U.S. at 373 (same); see also Mistretta, 488 U.S. at 416 (Scalia, J., dissenting) (explaining that the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law").

In enacting SORNA, Congress "broadly set policy goals that guide the Attorney General," and it "created SORNA with the specific design to provide the broadest possible protection to the public, and to children in particular, from sex offenders." Ambert, 561 F.3d at 1213. Congress identified the Attorney General as its agent, see 34 U.S.C. 20913(d), and it "made virtually every legislative determination in enacting SORNA, which has the effect of constricting the Attorney General's discretion to a narrow and defined category." Ambert, 561 U.S. at 1214; see Guzman, 591 F.3d at 93 (explaining that Congress delineated the crimes requiring

registration, the circumstances of registration, the information required to register, and the penalties for non-registration, leaving to the Attorney General only the applicability of SORNA to a discrete set of persons); see also Parks, 698 F.3d at 7-8 (explaining that Congress "delegat[ed] to the Attorney General the judgment whether th[e] [regulatory policy underlying the registration system] would be offset, in the case of pre-SORNA sexual offenders, by problems of administration, notice and the like for this discrete group of offenders -- problems well suited to the Attorney General's on-the-ground assessment"). This "Court has upheld much broader delegations than" Section 16913(d). Guzman, 591 F.3d at 93 (citing Mistretta, 488 U.S. at 372-373); cf. Touby v. United States, 500 U.S. 160, 165 (1991) (upholding the Attorney General's power to schedule controlled substances on a temporary basis). Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2017

No. 17-6086

IN THE

Supreme Court of the United States

HERMAN AVERY GUNDY,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE CATO INSTITUTE AND CAUSE OF ACTION INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does granting the attorney general unbounded discretion to define federal criminal liability violate the nondelegation doctrine?

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Gary Fields and John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, Wall St. J., July 23, 2011, https://on.wsj.com/2oKFAiM 19

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John Locke, *The Second Treatise of Government* 141, at 73 (J.W. Gough ed., Basil Blackwell 3d ed. 1976) (1690) 14

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INTEREST OF THE *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of constitutional government that are the foundation of liberty. To these ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

Cause of Action Institute is a nonprofit, nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law protect liberty and economic opportunity. As part of this mission, it works to expose and prevent government and agency misuse of power by appearing as *amicus curiae* in federal court. *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014) (citing CoA Institute's *amicus* brief).

This case interests *amici* because individual liberty is best preserved by a constitutionally constrained executive branch, consistent with the Framer's design. Specific to this case, *amici* also have an interest in challenging government overreach in the criminal-justice system, protecting the rule of law, and working to combat "overcriminalization."

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[1] Rule 37 statement: All parties received timely notice of intent to file this brief and consented to its filing. No counsel for any party authored any part of this brief and no person or entity other than *amici* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Imagine that Congress passed the following law:

SECTION 1: It shall be a criminal offense to behave on federal property in a manner annoying to persons passing by.

SECTION 2: The Attorney General shall have power to specify what behavior is annoying.

This Court has already determined that the operative language of the hypothetical Section 1 is unconstitutionally vague because it subjects citizens to an "unascertainable standard." *See Coates v. Cincinnati*, 402 U.S. 611, 614 (1971). But does adding Section 2 rehabilitate the law? The failure to enforce the nondelegation doctrine has thus undermined this Court's efforts against legislative vagueness. Is it any comfort to a defendant that the standard against which he is judged was devised not by the constable arresting him but by the nation's chief constable?

That's this case. Herman Gundy was punished for violating a law that no legislature enacted. He now stands convicted of a crime based on the attorney general's whim. Few insults to the principles of a free society could be greater. Our system of separated powers means, at the very least, that the powers must remain separate. This is not some mere appeal to procedural formality, but a guarantee of our rights as citizens.

The Vesting Clauses in the Constitution's first three articles establish a tripartite government of divided authority. While these may overlap at the margins, each branch retains a core set of powers such that it may check and balance the others. To permit delegation from one to another—for purported efficiency

gains—undermines that original design. After all, why should Congress deliberate, make judgments, and stand accountable for each determination when it can license the executive to apply purportedly greater wisdom or technocratic expertise? *Pace* Woodrow Wilson, that's not how this works.

Here, maybe sex-offense registries should record every past offender, or maybe they should record only offenses of the worst severity, or maybe they should look to aspects of a crime indicative of the risk of recidivism. Each of these is a coherent policy choice, but the Sex Offender Registration and Notification Act (SORNA) offers no pretense of making that policy choice. Instead it punts, assigning to the executive sole and unmoored discretion to determine the answer based on no principle, intelligible or otherwise. Such broad, delegated discretion is at odds with the promise of our founding document, which sought to prevent the "gradual concentration of the several powers in the same department." The Federalist No. 51 (Madison).

These concerns are not an embrace of formalism for its own sake, but the foundation of the rule of law, which requires that prosecutorial authority be cabined within strictures defined by the people's representatives. *Ad hoc* adjudication may have been sufficient for King Solomon, *see* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1176 (1989), but neither authority nor wisdom is divinely granted to the executive under our Constitution. The division of legislative and enforcement authority thus limits each, ensuring that citizens have notice of the laws they must follow, accountability from those who make them, and assurance that their legal duties won't fluctuate at an official's caprice.

These concerns for the separation of powers, and ultimately the rule of law, are most acute where they implicate personal liberty. While the Court has allowed broad discretion when determining, say, the safe level of a hazardous chemical, criminal liability is different. Administering criminal law is a core function of the government, but it's equally important that criminal law be constrained within constitutional bounds. Indeed, two constitutional provisions, the Ex Post Facto Clause and the Bill of Attainder Clause, indicate our system's particular concern with preventing abuses of criminal law. Those concerns were important enough that the Framers' applied the provisions to both the federal and state governments. U.S. Const. art. I, §§ 9, 10. Criminal proscriptions must be clear and discernable, not subject to the vagaries of executive discretion. The delegation of authority to the attorney general thus represents a fundamental threat to constitutional design, eliding the line between making and enforcing criminal law.

When "the right both of making and of enforcing the laws . . . are united together, there can be no public liberty." 1 W. Blackstone, *Commentaries on the Laws of England* 142 (1765). Indeed, the Declaration of Independence denounced the king's "Arbitrary government" and "pretended offenses." A century after the Constitution aimed to prevent such tyranny, the Court said: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892).

The Court should again check the unlawful delegation of congressional responsibility and reaffirm John

Adams's proscription that "[t]he executive shall never exercise the legislative and judicial powers . . . to the end it may be a government of laws and not of men." Mass Const. pt. 1, art. XXX. Constitutional structure exists to protect each of us, and so we must protect it.

ARGUMENT

I. ENFORCING THE NONDELEGATION DOCTRINE IS ESSENTIAL TO PRESERVING CONSTITUTIONAL STRUCTURE

A. The Vesting Clauses Establish Separate Spheres of Authority

"The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). Article I states that "[a]ll legislative Powers herein granted shall be vested in a Congress." U.S. Const. art. I, § 1. In conjunction with the vesting clauses that open Articles II and III, the Article I Vesting Clause sets the core design of our constitutional structure. This is not a disposable organizational chart. Instead, the Framers laid out separate spheres of authority because "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47 (Madison). Recognizing this, they set out to divide and conquer the ambition of any tyrant, making each branch answerable to the others, since "[a]mbition must be made to counteract ambition." The Federalist No. 51 (Madison).

Intrinsic to this approach to governance is the recognition that no branch may delegate its assigned

sphere to any other. Without that principle, the structure itself would be a nullity. Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 340 (2002) ("The Vesting Clauses, and indeed the entire structure of the Constitution, make no sense [if there is no limit on delegations]."). This point is not new. In the Second Congress, legislators rejected an amendment which would have granted the president the power to determine postal routes. *Id.* at 402. One representative, with a bit of cheek, announced that if that amendment passed he would "make one which will save a deal of time and money, by making a short session of it; for if this House can, with propriety, leave the business of the post office to the President, it may leave to him any other business of legislation." 3 Annals of Cong. 223 (1791). Considering a grant of authority to the judiciary, Chief Justice Marshall declared some years later that "[i]t will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825).

Excessive delegation creates other mischief too. "Delegation undermines separation of powers, not only by expanding the power of executive agencies, but also by unraveling the institutional interests of Congress." Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463, 1465 (2015). The result is a legislature whose members are less accountable both to their constituents and to each other. It discharges them from the duty to come together as a deliberative body to legislate on even the most pressing matters. *Id.* Under this framework, Congress need not shoulder the responsibilities for the policies they've enabled, instead retaining plausible deniability as the executive confronts the

hard questions of governing. *See* Morris P. Fiorina, *Group Concentration and the Delegation of Legislative Authority*, in *Regulatory Policy and the Social Sciences* 175, 187 (Roger G. Noll ed., 1985). In place of a clash of ambitions, "[l]awmakers may prefer to collude, rather than compete, with executive agencies over administrative power and so the Madisonian checks and balances will not prevent excessive delegations." Rao, *supra*, at 1466.

Recognizing these concerns, the Court has a long-developed doctrine limiting Congress's discretion to delegate its legislative prerogatives. As Justice Rehnquist explained:

> First, and most abstractly, [the nondelegation doctrine] ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion. Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.

Indus. Union Dep't, AFL-CIO v. API, 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring) (internal citation omitted).

Here, it may have been a valid policy choice for Congress to have prescribed registration for pre-

SORNA offenses as for post-SORNA offenses. But Congress declined to do so. Instead it passed this duty to another branch to make the determination, with no indication of how it was to be made. The nondelegation doctrine prohibits this abrogation of responsibility. *See, e.g., Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1244 (2015) (Thomas, J., concurring) ("[T]he separation of powers is, in part, what supports our enduring conviction that the Vesting Clauses are exclusive and that the branch in which a power is vested may not give it up or otherwise reallocate it.").

B. Concerns About Indeterminate Standards Should Not Be Allowed to Undermine Basic Constitutional Structure

This Court has often been hesitant to overturn legislative grants of discretion to the executive. This reluctance comes in part from the inherent difficulty of drawing clean lines between different branches' prerogatives. *See Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting) ("[N]o statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree."). Chief Justice Marshall recognized this even as he expounded the importance of the principle. *Wayman*, 23 U.S. at 43 ("The line has not been exactly drawn which separates those important subjects").

Yet "the inherent difficulty of line-drawing is no excuse for not enforcing the Constitution." *Ass'n of Am. R.R.*, 135 S. Ct. at 1237 (Alito, J., concurring). The Court's hesitation to police the constitutional boundary has allowed legislative delegations to metastasize,

such that today "the citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, 'in the public interest'—can perhaps be excused for thinking that it is the agency really doing the legislating." *Id.* (quoting *Arlington* v. *FCC*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting)).

Yet the Court does not decline to enforce other constitutional protections due to line-drawing problems. What, exactly, constitutes an "undue burden" on the right of a woman to choose an abortion? *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). How does one distinguish between "conduct" and "speech?" *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). What is a sufficiently "substantial" relation to a sufficiently "important" government interest when assessing distinctions on the basis of sex? *Craig v. Boren*, 429 U.S. 190 (1976). When is a search "reasonable?" *Whren v. United States*, 517 U.S. 806 (1996). These questions are not self-answering. Yet the Court has answered them in case after case—and lower courts have also weighed in. The accretion of common-law wisdom has created doctrines that can now be applied and continually refined through that application. The paucity of guidance and clarity on the nondelegation doctrine is simply a function of this Court's skittishness in giving it shape. And a deficit that only this Court can remedy.

"[T]he Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). Indeed, the Court has often walked with a light step while treading on Congress's judgment. *See, e.g. N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 25 (1932) (holding

that regulating in the "public interest" was "not a concept without ascertainable criteria"). But "the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained." *Schechter Poultry*, 295 U.S. at 530.

Nondelegation principles "do not prevent Congress from obtaining the assistance of its coordinate Branches," *Mistretta*, 488 U.S. at 372 (1989), and few doubt "the inherent necessities of government coordination." *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928). But obtaining necessary assistance does not license the avoidance of difficult questions. Congress's rulemaking authority, as ratified by this Court, does not come from Congress's being "too busy or too divided and can therefore assign its responsibility of making law to someone else." *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting).

To the extent humility is warranted, it is in those areas where "the field is sufficiently technical, the ground to be covered sufficiently large, and the Members of Congress themselves not necessarily expert in the area in which they choose to legislate" such that it makes sense that "Congress lay down the general policy and standards that animate the law, leaving the agency to refine those standards" *Indus. Union*, 448 U.S. at 675 (Rehnquist, J., concurring). This is also not a license for the legislature to forego its responsibility of informing itself about the subjects upon which it is prepared to declare new law. But whatever the legislature's limitations when determining the safe level of carcinogens, they are of no moment in the context of

SORNA. This statute illustrates in detail the conduct and categories that Congress wished to address, only punting on the question of pre-SORNA conduct. But defining pre-SORNA conduct does not require analyzing complex chemical compositions or reference to statistical regressions. Deciding which prior crimes warrant registration is no more complex a question than which future crimes warrant the same. Yet Congress could not come to an agreement on the matter. If Congress cannot resolve to define a legal prescription to govern the conduct of citizens, *amici* submit that there can be no valid prescription at all.

This Court's cases ask whether SORNA "furnishes a declaration of policy or a standard of action." *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 416 (1935). It is entirely within Congress's power to "establish primary standards, devolving upon others the duty to carry out the declared legislative policy." *Id.* at 426. But there is no primary standard here, nor a secondary or tertiary one. The statute simply provides that "the Attorney General shall have authority to specify the applicability of the requirements of this subchapter." 34 U.S.C. § 20913(d). He may require sex offenders to register based on the severity of their crime, the time since their conviction, or at random based on the first letter of their last names. He may consult the laws of the various states or various astrological charts.[2] SORNA grants him "an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment." *Panama Ref.*, 293 U.S. at 416.

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[2] Some such decisions or actions may violate due process, but that would still be the case if Congress were taking them itself.

Even those cases that suggest a more solicitous deference toward delegation acknowledge that a statute cannot survive if there is "an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus v. United States*, 321 U.S. 414, 426 (1944). That is this case. The statute delegates to the executive standardless discretion to define the set of prior offenders to whom SORNA applies. The "will of Congress" cannot be discerned from a standard Congress did not write.

Moreover, the Court has emphasized that it is of no moment whether the choice the executive makes could be defended on its own terms as sound or restrained: "The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001). The question is whether the statute, on its face, is an impermissible delegation, not whether the path chosen travels too far afield, because "[t]he very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority." *Id.*

If the delegation here is to be allowed, what would remain of the nondelegation doctrine and the protections to liberty it affords? Could Congress outlaw "all transactions in interstate commerce that fail to promote goodness and niceness," and leave it to the secretary of commerce to determine the details? Lawson, *supra*, at 340. As an English sentence, that statute is "not literally gibberish," *id.*, and *amici* do not suggest

the secretary would seek to do his duty with anything but honor. Yet what is left, at that point, of the separation of powers? Indeed, what are we left with but a philosopher king of commerce?[3] Before one objects to this theater of the absurd, notice that Professor Lawson's hyperbole provides more notice, more guidance, and more intelligibility than Congress provided in SORNA. At least his hypothetical secretary is obliged to encourage citizens to be good and nice.

The Court has struck down two legislative delegations, "one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Whitman*, 531 U.S. at 474. So petitioner is in luck, because here again the statute provides no guidance in the most literal sense. Reversing the decision below would not be a bold new journey where no court has gone before, but a reassertion of the most basic outer bounds of delegable authority. Affirming it would further consign the doctrine to desuetude.

II. THE STRUCTURAL PROTECTIONS PRESERVED BY THE NONDELEGATION DOCTRINE ARE FUNDAMENTAL TO THE RULE OF LAW

A. The Rule of Law Requires a Separation of Law-Making and Law-Executing

The separation-of-powers concerns raised by SORNA's delegation are a primary component of the

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[3] True, it's a philosopher king who must go through notice and comment rulemaking—perhaps. *See generally Auer v. Robbins*, 519 U.S. 452 (1997).

rule of law itself. Separation of powers does not merely divvy up of responsibly for the sake of efficiency but guarantees that each of us will be accountable to a sovereign who remains accountable to the people. That sovereign can deprive us of our liberty only by adhering to standards laid down in advance.

"There can be no liberty where the legislative and executive powers are united in the same person." The Federalist No. 47 (Madison) (quoting Montesquieu). The reason is that "apprehensions may arise, lest the same monarch or senate that makes tyrannical laws will execute them tyrannically." Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York*, 76 Tul. L. Rev. 265, 307 (2001) (cleaned up).

Locke elaborated on the same sentiment:

> It may be too great a temptation to human frailty, apt to grasp at power, for the same persons, who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage.

Id. (quoting John Locke, *The Second Treatise of Government* 73 (J.W. Gough ed., Basil Blackwell 3d ed. 1976) (1690)). If men were angels, such internal division and controls would not be necessary, but in "framing a government which is to be administered by men over men . . . you must first enable the government to control the governed; and in the next place oblige it to control itself." The Federalist No. 51 (Madison). The

Framers built the federal system to prevent the accrual of too much power in any one hand.

Separating the spheres of authority limits the discretion of each sphere. The lawmaker determines a sound rule and writes it down for all to examine; the law-enforcer independently takes that rule and finds those who don't adhere to it; and the law-adjudicator independently confirms that the rule was followed and is consistent with the larger body of rules. No one of the three may abridge the liberty of a citizen without the consent of the other two. The citizen is shielded from the political convenience of the legislator, the personal vendetta of the policeman or prosecutor, and the idiosyncrasy of the judge.

When the separation of powers is eroded, those protections break down. The prosecutor can charge people for crimes and infractions never contemplated by the legislature, the representatives of the people. An unconstrained judge can rule against those he dislikes. When legislatures act as judge and prosecutor it violates the Bill of Attainder Clause. U.S. Const. art. I, § 9, cl. 3. And when the prosecutor writes the laws he will seek to enforce, the best solution is often for judges to decline to approve such overreach, as here.

This Court recently reaffirmed a parallel principle of federalism: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of lawful powers, that liberty is at stake." *Bond v. United States*, 564 U.S. 211, 221–22 (2011) (cleaned up). As with the division of power between the states and the federal government, the division of power between the coordinate branches protects individual liberty, not

simply the prerogatives of the branches themselves. Where this Court fails to enforce these divisions, liberty is imperiled, as was the case in some shameful episodes in the nation's history. *See, e.g., Hirabayashi v. United States*, 320 U.S. 81, 104 (1943) (approving the delegation of authority to military commanders to intern citizens of Japanese descent).

SORNA "purports to authorize the [attorney general] to pass a prohibitory law." *Panama Ref.* 293 U.S. at 414. It is that regulation—not the statute—that criminalizes Gundy's failure to register. Blackstone "defined a 'law' as a generally applicable 'rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.'" *Ass'n of Am. R.R.*, 135 S. Ct. at 1244 (Thomas, J., concurring). He defined a tyranny as the ability to both make and enforce those rules. *Id.* While upholding Gundy's conviction would not march our system into tyranny, it would move us one step further down a road we should not be on.

B. Undermining the Rule of Law Is Most Dangerous When Criminal Liability Is at Issue

Mr. Gundy stands convicted of failing to heed a rule that cannot be found in any law passed by Congress. Instead, his criminality was determined by the attorney general alone. It is precisely this context in which the Court must exercise its highest vigilance, because criminal liability has such an awesome impact on the exercise of individual rights and freedoms.

The imposition of criminal sanction by executive fiat is one of the tyrannies the Founders most feared. They weren't drafting grievances against King George

III for improperly specifying ozone standards. Commentators as far back as Lord Coke affirmed that the king could not "change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament." *Ass'n of Am. R.R.*, 135 S. Ct. at 1243 (Thomas, J., concurring) (citing *Case of Proclamations*, 12 Co. Rep. 74, 75, 77 Eng. Rep. 1352, 1353 (K.B. 1611)).

This Court has long imposed stringent review on criminal prohibitions due to the abusive potential of executive discretion. It has struck down laws that fail to articulate standards for criminal liability. *See, e.g., Johnson v. United States*, 135 S. Ct. 2551 (2015). Even when standards are otherwise permissible, the Court interprets them on the side of lenity. *See, e.g., United States v. Santos*, 553 U.S. 507, 514 (2008). Most recently, in a case striking down a vague immigration law, Justice Gorsuch opined that "[v]ague laws invite arbitrary power." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018) (Gorsuch, J., concurring). If vaguely written laws can't survive, then surely laws that don't exist should receive no better treatment. No law is vaguer than one that leaves a blank and directs executive officers to fill it in.

In addition to striking down vague laws, the Court consistently cabins prosecutorial authority by adopting limiting interpretations of broad statutes. Twice in the past four years, the Court has considered the Justice Department's creative readings of Title 18, and twice it has pulled the U.S. Code back from the brink of absurdity. *See Yates v. United States*, 135 S. Ct. 1074 (2015); *Bond v. United States*, 134 S. Ct. 2077 (2014). However pernicious a statute that defines photo development chemicals as a weapon of mass destruction

may be, more pernicious still is a statute that defines nothing at all.

Moreover, shifting administrative determinations makes the delegation of criminalization intolerable. Administrative authority is, by design, exercised to varying degree from administration to administration. Every four or eight years, a new executive with a new mandate is elected by the people, and he brings new preferences to bear on the powers Congress has granted. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 157 (2012) (cataloging the Labor Department's changing interpretations of the Fair Labor Standards Act). In the context of the economy or the environment, those shifting standards might be tolerable—the voters may rightly pass judgment on the wisdom of this or that regulation, and their chosen representatives may respond to their preference. But the maintenance of a regime of criminal liability should not be subject to such transient caprice.

The previous attorney general determined that Gundy should be required to register—and for this failure Gundy stands convicted. If the next attorney general thinks differently and changes the rule, the requirement no longer exists. Not based on any principle—for there is no principle that guides the attorney general's discretion—but only on the vagaries of administrative preference. We the people thus stand adjudged not by a defined standard of conduct passed by a bicameral legislature and signed by the president, but by a political and administrative weathervane.

Finally, all of this comes in the context of a criminal code that has expanded to the point where even the government no longer knows how many federal crimes exist. Gary Fields & John R. Emshwiller, *Many Failed*

Efforts to Count Nation's Federal Criminal Laws, Wall St. J., July 23, 2011, https://on.wsj.com/2oKFAiM. So numerous are such provisions, and so indeterminate many of their requirements, that each of us is, by the odds, a daily felon. *See* Harvey Silverglate, *Three Felonies A Day: How The Feds Target The Innocent* (2011). Dissatisfied with this already intolerable state of affairs, the government asks this Court to extend its authority even further. The Court should not help the government further expand criminal law.

CONCLUSION

For these reasons, and those stated by the Petitioner, the Court should reverse the decision below.

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No. 17-6086

IN THE

Supreme Court of the United States

HERMAN AVERY GUNDY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

JOINT APPENDIX

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IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United States of America v. Herman Avery Gundy

Case No. 16-1829

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
05/18/2017	54	CASE, BEFORE RCW, SLC, CFD, C.JJ., HEARD. [2038020] [16-1829] [ENTERED: 05/18/2017 10:26 AM]
06/22/2017	57	SUMMARY ORDER AND JUDGMENT, AFFIRMING THE DISTRICT COURT JUDGMENT, BY RCW, SLC, CFD, C.JJ., FILED. [2063858] [16-1829] [ENTERED: 06/22/2017 09:55 AM]
07/13/2017	59	JUDGMENT MANDATE, ISSUED. [2078539] [16-1829] [ENTERED: 07/13/2017 04:28 PM]

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United States of America v. Herman Avery Gundy

Case No. 13-3679

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
10/28/2014	68	CASE, BEFORE RAK, CH. J., PWH, SLC, C.JJ., HEARD. [1355726] [13-3679] [ENTERED: 10/28/2014 11:37 AM]
09/14/2015	70	OPINION, REVERSING THE DISTRICT COURTS ORDER DISMISSING THE INDICTMENT AND REMANDING THE CAUSE TO THE DISTRICT COURT FOR REINSTATEMENT OF THE INDICTMENT AND FOR FURTHER PROCEEDINGS CONSISTENT THIS OPINION, BY RAK, PWH, SLC, FILED. [1597084] [13-3679]--[EDITED 09/14/2015 BY RO] [ENTERED: 09/14/2015 10:19 AM]
10/07/2015	77	JUDGMENT MANDATE, ISSUED. [1614554] [13-3679] [ENTERED: 10/07/2015 11:13 AM]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

United States of America v. Herman Avery Gundy

Case No. 1:13-CR-00008

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
12/03/2012	1	COMPLAINT as to Herman Avery Gundy (1) in violation of 18 U.S.C. 2250. (Signed by Magistrate Judge Gabriel W. Gorenstein) (gq) [1:12-mj-03113-UA] (Entered: 12/03/2012)
01/07/2013	5	INDICTMENT FILED as to Herman Avery Gundy (1) count(s) 1. (jbo) (Entered: 01/07/2013)
05/22/2013	33	MEMORANDUM AND ORDER: as to (13-Cr-8) Herman Avery Gundy. Defendant Herman Avery Gundy is charged with one count of failing to register as a sex offender under the Sex Offender Registration and Notification Act, 18 U.S.C. Section 2250. Gundy has moved to dismiss the Indictment. For the reasons that follow, his motion is granted....[See Memorandum And Order]... Conclusion: For the foregoing reasons, Defendant's motion to dismiss the indictment

		is GRANTED. SO ORDERED. (Signed by Judge J. Paul Oetken on 5/22/2013)(bw) (Entered: 05/22/2013)
05/31/2013	34	MOTION for Reconsideration. Document filed by USA as to Herman Avery Gundy. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Quigley, Brendan) (Entered: 05/31/2013)
09/11/2013	36	OPINION AND ORDER as to Herman Avery Gundy re: 34 MOTION for Reconsideration filed by USA. Defendant Herman Avery Gundy was charged with one count of failing to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250. On May 22, 2013, this Court granted Gundys motion to dismiss the indictment, holding that Gundy was not subject to SORNAs registration requirements at the time of the interstate travel alleged by the Government. For the foregoing reasons, the Governments motion for reconsideration is DENIED. (Signed by Judge J. Paul Oetken

		on 9/11/2013)(jw) (Entered: 09/11/2013)
09/27/2013	37	NOTICE OF APPEAL by USA as to Herman Avery Gundy from 33 Memorandum & Order, 36 Opinion & Order. (nd) (Entered: 09/30/2013)
10/07/2015	39	MANDATE of USCA (Certified Copy) as to Herman Avery Gundy re: 37 Notice of Appeal. USCA Case Number 13-3679. IT IS HEREBY ORDERED, ADJUDGED and DECREED that the district court's order dismissing the Indictment is REVERSED and the cause is REMANDED to the District Court for reinstatement of the Indictment and for further proceedings in accordance with the 38 opinion of this court.. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Issued As Mandate: 10/07/2015. (nd) (Entered: 10/07/2015)
03/28/2016		COURT VERDICT as to Herman Avery Gundy (1) Guilty on Count 1. (jbo); Modified on 5/31/2016 (bw). (Entered: 03/29/2016)

03/28/2016	50	STIPULATION - UNSIGNED as to Herman Avery Gundy. (ft) (Entered: 03/28/2016)
05/27/2016	58	ORDER OF TIME SERVED: as to Herman Avery Gundy. It is hereby ordered that Herman Avery Gundy, the defendant, is hereby sentenced to time served. SO ORDERED: (Signed by Judge J. Paul Oetken on 5/27/2016)(bw) (Entered: 05/27/2016)
05/27/2016	59	JUDGMENT In A Criminal Case. Date of Imposition of Judgment: 5/27/2016. Defendant Herman Avery Gundy (1) was found guilty on Count(s) 1, after a plea of not guilty. IMPRISONMENT: Time Served. The defendant is remanded to the custody of the United States Marshal. SUPERVISED RELEASE: 5 years. The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. The defendant shall cooperate in the collection of DNA as directed by the probation officer. Special Conditions of Supervision: -The defendant will register with the state sex offender registration agency in any state where he

		resides, where he is employed or works, and shall provide proof of registration to the probation officer. -The defendant shall participate in an outpatient substance abuse treatment program approved by the Probation Office, which may include testing to determine whether you have reverted to using drugs or alcohol. The defendant shall contribute to the costs of services rendered based on ability to pay and availability of third-party payment. The Court authorizes the release of available drug treatment evaluations and reports, including the presentence report, to the substance abuse treatment provider. -The defendant shall undergo a sex-offense-specific evaluation and participate in a sex offender treatment and/or outpatient mental health treatment program approved by the probation officer. The defendant shall abide by the rules, requirements, and conditions of the sex offender treatment program, including submission to polygraph testing. The defendant shall waive confidentiality with respect to

		any records for mental health assessment and treatment imposed as a consequence of this judgment to allow the probation officer to review the course of treatment and progress with the treatment provider. The defendant shall contribute to the costs of services rendered based on the ability to pay or availability of third party payment. The Court authorizes the release of available psychological and psychiatric evaluations and reports, including the presentence investigation report, to the sex offender treatment provider and/or the mental health treatment provider. -The defendant shall report to the nearest Probation Office within 72 hours of the judgment. -The defendant shall be supervised by the district of residence. -The fine is waived because of inability to pay. -The defendant will pay a special assessment in the amount of $100.00. ASSESSMENT: $100.00, due immediately. (Signed by Judge J. Paul Oetken on 5/27/2016)(bw) (Entered: 05/31/2016)

06/01/2016	60	AMENDED JUDGMENT In A Criminal Case. Date of Imposition of Judgment: 6/1/2016. Date of Original Judgment: 5/27/2016. Reason for Amendment: Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36). Defendant Herman Avery Gundy (1) was found guilty on Count(s) 1, after a plea of not guilty. IMPRISONMENT: Time Served. SUPERVISED RELEASE: 5 years. The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. The defendant shall cooperate in the collection of DNA as directed by the probation officer. Special Conditions of Supervision (see page 4 of Judgment). ASSESSMENT: $100.00, due immediately. (Signed by Judge J. Paul Oetken on 6/1/2016) [*** NOTE: See Imprisonment page, page 2 of Judgment. ***](bw) (Entered: 06/01/2016)
06/08/2016	61	NOTICE OF APPEAL by Herman Avery Gundy from 60 Amended Judgment, 59 Judgment. (nd) (Entered: 06/09/2016)

06/16/2016	62	2nd AMENDED JUDGMENT In A Criminal Case. Date of Imposition of Judgment: 6/16/2016. Date of Original Judgment: 6/1/2016. Reason for Amendment: Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36). Defendant Herman Avery Gundy (1) was found guilty on Count(s) 1, after a plea of not guilty. IMPRISONMENT: Time Served. SUPERVISED RELEASE: 5 years. The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. The defendant shall cooperate in the collection of DNA as directed by the probation officer. Special Conditions of Supervision: -The defendant will register with the state sex offender registration agency in any state where he resides, where he is employed or works, and shall provide proof of registration to the probation officer. -The defendant shall participate in an outpatient substance abuse treatment program approved by the Probation Office, which may include testing to determine whether you have reverted to

		using drugs or alcohol. The defendant shall contribute to the costs of services rendered based on ability to pay and availability of third-party payment. The Court authorizes the release of available drug treatment evaluations and reports, including the presentence report, to the substance abuse treatment provider. -The defendant shall undergo a sex-offense-specific evaluation and participate in a sex offender treatment and/or outpatient mental health treatment program approved by the probation officer. The defendant shall abide by the rules, requirements, and conditions of the sex offender treatment program, including submission to polygraph testing. The defendant shall waive confidentiality with respect to any records for mental health assessment and treatment imposed as a consequence of this judgment to allow the probation officer to review the course of treatment and progress with the treatment provider. The defendant shall contribute to the costs of services rendered based on the ability to pay or

		availability of third party payment. The Court authorizes the release of available psychological and psychiatric evaluations and reports, including the presentence investigation report, to the sex offender treatment provider and/or the mental health treatment provider. -The defendant shall report to the nearest Probation Office within 72 hours of the judgment. -The defendant shall be supervised by the district of residence. -The fine is waived because of inability to pay. -The defendant will pay a special assessment in the amount of $100.00. ASSESSMENT: $100.00, due immediately. (Signed by Judge J. Paul Oetken on 6/16/2016)(bw) (Entered: 06/16/2016)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of June, two thousand seventeen.

PRESENT:

RICHARD C. WESLEY,
SUSAN L. CARNEY,
CHRISTOPHER F. DRONEY,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

No. 16-1829

HERMAN AVERY GUNDY, AKA HERMAN GRUNDY,

Defendant-Appellant.

FOR APPELLANT: SARAH BAUMGARTEL, Federal Defenders of New York, Inc., New York, NY.

FOR APPELLEE: EMIL J. BOVE III (Brendan F. Quigley, Brian R. Blais, *on the brief*), Assistant United States Attorneys, *for* Preet Bharara, United States Attorney for the Southern District of New York, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Oetken, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the June 16, 2016 judgment of the District Court is **AFFIRMED**.

Defendant-appellant Herman Gundy appeals his conviction and sentence, following a bench trial on stipulated facts, for one count of failing to register as a

sex offender after traveling in interstate commerce, in violation of the Sex Offender Registration and Notification Act ("SORNA"), 18 U.S.C. § 2250(a). We assume the parties' familiarity with the underlying facts and the procedural history of the case, to which we refer only as necessary to explain our decision to affirm.

While serving a federal sentence for violating Maryland Criminal Law § 3-306, Sexual Offense in the Second Degree, during his supervised release for a prior federal offense, Gundy was transferred from Maryland to a federal prison in Pennsylvania. *See United States v. Gundy*, 804 F.3d 140, 143 (2d Cir. 2015). As he approached the end of his federal sentence, Gundy authorized the Department of Justice to make arrangements for his move to community-based custody. He was ordered to be transferred to the Bronx Residential Re-Entry Center, a halfway house in New York, and he was granted a furlough to travel unescorted on a commercial bus on July 17, 2012, from Pennsylvania to the Bronx. Gundy arrived at the Re-Entry Center as planned, and, on August 27, 2012, was released from federal custody there to a private residence in the Bronx. Gundy did not register as a sex offender in either Maryland or New York, as state law required, and was arrested and charged under 18 U.S.C. § 2250. *Id.* at 144. After the District Court granted Gundy's motion to dismiss the prosecution for the absence of a trigger for SORNA's registration requirement, this Court reversed the dismissal and reinstated the indictment, holding that the requirement was triggered because Gundy was "required to register" under SORNA no later than August 1, 2008. *See id.* at 145.

Upon the indictment's reinstatement, Gundy renewed his motion to dismiss on the basis that the interstate travel requirement of the statute was not satisfied because he was still in custody when he traveled from Pennsylvania to the Bronx. The District Court denied the motion, holding that the statute did not include an exception to the interstate travel element based on a defendant's custodial status. The District Court also held that, even if the statute did include a voluntariness or *mens rea* requirement, the allegations of the indictment were sufficient for that issue to be resolved at trial.

A bench trial followed on stipulated facts. The District Court found that each element of the offense had been proven beyond a reasonable doubt, including the interstate travel element and any voluntariness or *mens rea* requirement that may apply, and thus found Gundy guilty of violating § 2250. Following a sentencing hearing, the District Court entered judgment imposing a sentence of time served and a five-year term of supervised release. Gundy now appeals from that judgment.

Section 2250(a) imposes criminal liability on anyone who (1) is required to register under SORNA; (2) travels in interstate or foreign commerce; and (3) knowingly fails to register or update a required registration. 18 U.S.C. § 2250(a). We held in our consideration of Gundy's earlier appeal that Gundy satisfies the first requirement. There is no dispute that he knowingly failed to register, thus satisfying the third requirement. On appeal, Gundy asks us to read in an exception to the second requirement, travel in interstate commerce, for a defendant who crosses state lines while in federal custody. He contends that

holding otherwise would violate the usual requirement of criminal law that criminal acts be committed voluntarily. The parties also dispute whether, on the stipulated facts and conclusions of the District Court following the bench trial, Gundy's travel from Pennsylvania to New York was voluntary.

We decline to reach Gundy's argument regarding the interpretation of § 2250(a).[1] Assuming *arguendo* that Gundy is correct and that the travel element contains an implicit voluntariness requirement, that requirement is easily met on the facts of this case. Although Gundy remained technically in federal custody when traveling to the halfway house in New York, the stipulated facts at trial are sufficient to support the District Court's finding that Gundy's travel was voluntary. On the basis of those facts, the District Court was free to conclude that Gundy made the trip in question willingly, as he authorized the initial transfer process and then traveled by bus to New York on his own recognizance. *See United States v. Pierce*, 224 F.3d 158, 164 (2d Cir. 2000) (noting that standard of review for sufficiency of the evidence is the same in a bench trial as a jury trial). We need not and do not reach the question of statutory interpretation because, even assuming Gundy is correct that

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[1] To the extent Gundy attempts to present his case as two separate arguments—one based on voluntariness, and one based on a lack of congressional "focus" on sex offenders in custody (supporting the creation of a *per se* custodial travel exemption)—we are unpersuaded. Gundy himself repeatedly blends these arguments, *see, e.g.*, Appellant's Br. 1, 11, and he provides us with no real reason to look to look past the statute's text to other expressions of congressional intent except for his stated concern about the voluntariness of custodial travel.

interstate travel in § 2250(a) is limited to voluntary travel, the District Court reasonably found that the travel here was voluntary.

* * *

We have considered Gundy's remaining arguments and find them to be without merit.[2] Accordingly, we **AFFIRM** the judgment of the District Court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

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[2] This includes Gundy's argument—foreclosed by *United States v. Guzman*, 591 F.3d 83, 91-93 (2d Cir. 2010), and made only for preservation purposes—that SORNA violates antidelegation principles.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2014

(Argued: October 28, 2014
Decided: September 14, 2015)

Docket No. 13-3679-cr

UNITED STATES OF AMERICA,

Appellant,

- v. -

HERMAN AVERY GUNDY, A/K/A HERMAN GRUNDY,

Defendant-Appellee.

Before:

KATZMANN, *Chief Judge*, HALL and CARNEY, *Circuit Judges*.

BRENDAN F. QUIGLEY, Assistant United States Attorney (Emil J. Bove III and Justin Anderson, Assistant United States Attorneys, *on the brief*), *for* Preet Bharara, United States Attorney for the Southern District of New York, New York, NY, *for Appellant*.

SARAH BAUMGARTEL (Yuanchung Lee, *on the brief*), Federal Defenders of New York, Inc., Appeals Bureau, New York, NY, *for Defendant-Appellee*.

OPINION

SUSAN L. CARNEY, *Circuit Judge*:

The United States appeals from orders of the United States District Court for the Southern District of New York (J. Paul Oetken, *Judge*) dismissing the January 7, 2013 Indictment against Defendant–Appellee Herman Avery Gundy and denying its motion for reconsideration of the dismissal. The Indictment charged Gundy with a violation of the Sex Offender Registration and Notification Act ("SORNA" or the "Act"), which makes it a federal crime for a person who (1) "is required to register under [SORNA]," and (2) "travels in interstate or foreign commerce," to then (3) "knowingly fail[ ] to register or update a registration as required by [SORNA]." 18 U.S.C. § 2250(a); *see Carr v. United States*, 560 U.S. 438, 446 (2010) (explaining that the elements must be satisfied in sequence). This case requires us to decide when a person is "required to register" within the meaning of SORNA. The District Court, reasoning that Gundy was not "required to register" until shortly before his release from custody and thus after the interstate travel charged in the Indictment, held that Gundy could not have violated § 2250(a). Because we disagree with the District Court's conclusion that Gundy was not "required to register" until after the charged interstate travel, we REVERSE the District Court's order dismissing the Indictment and REMAND the cause to the District Court for reinstatement of the Indictment and for further proceedings.

BACKGROUND

A. The Sex Offender Registration and Notification Act

The federal government has set national standards for sex offender registration and notification since 1994, when it first required states to adopt registration laws as a condition for receiving federal law enforcement funds. *See* Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103–322, § 170101, 108 Stat. 2038, 2038–42 (1994) (repealed 2006); *see also* Final Guidelines, 73 Fed. Reg. 38,030 (July 2, 2008). The Sex Offender Registration and Notification Act, which was enacted on July 27, 2006, *see* Pub. L. No. 109–248, 120 Stat. 590, was designed to improve the existing system by "mak[ing] more uniform what had," until that point, "remained a patchwork of federal and 50 individual state registration systems, with loopholes and deficiencies that had resulted in an estimated 100,000 sex offenders becoming missing or lost." *United States v. Kebodeaux*, - — U.S. ——, 133 S. Ct. 2496, 2505 (2013) (citations and internal quotation marks omitted). Among other things, the Act created the National Sex Offender Registry, *see* 42 U.S.C. § 16919; imposed new guidelines on the states for the maintenance of registries, *see id.* §§ 16912, 16914; and imposed new registration requirements on offenders, *see id.* §§ 16913–16—while repealing much of the then-existing registration regime, *see id.* §§ 14071–73 (2006).

To promote offenders' compliance with the new registration requirements, SORNA made it a federal crime to fail to register or update one's registration as

required by the Act under certain circumstances. In relevant part, the criminal law provides as follows:

> (a) In general.—Whoever—
>
> (1) is required to register under [SORNA];
>
> (2) ...
>
> (B) travels in interstate or foreign commerce ... and
>
> (3) knowingly fails to register or update a registration as required by [SORNA];
>
> shall be fined under this title or imprisoned not more than 10 years, or both.

18 U.S.C. § 2250.[1]

The particular civil registration requirements upon which criminal liability under § 2250(a) depends are set out at 42 U.S.C. § 16913. *See Reynolds v.*

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[1] Section 2250(a) provides in full:

> (a) In general.—Whoever—
>
> (1) is required to register under the Sex Offender Registration and Notification Act;
>
> (2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
>
> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
>
> (3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;
>
> shall be fined under this title or imprisoned not more than 10 years, or both.

United States, ___ U.S. ___, 132 S.Ct. 975, 978–79, (2012); *see also United States v. Guzman*, 591 F.3d 83, 90 (2d Cir. 2010) (explaining that, "without § 16913, § 2250 has no substance" (internal quotation marks omitted)). Subsection (a) of § 16913 contains the core registration mandate. It provides:

> A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

42 U.S.C. § 16913(a). Subsection (b) governs the timing of "Initial registration," stipulating that "[t]he sex offender shall initially register—(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or (2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment." *Id.* § 16913(b). Subsection (c) sets the terms under which a sex offender must update his or her registration, requiring a sex offender to report within three business days—in person and in at least one registration jurisdiction—any "change of name, residence, employment, or student status." *Id.* § 16913(c).

The duration of these registration requirements is specified in 42 U.S.C. § 16915: The "full registration period" is fifteen years for a statutorily defined "tier I" sex offender, twenty-five years for a "tier II" sex

offender, and the life of the offender for a "tier III" offender. 42 U.S.C. § 16915(a); *see also id.* § 16911(2)-(4) (defining tiers of sex offenders). The period of required registration is reduced for those offenders who maintain "clean record[s]" for a sufficient number of years. *Id.* § 16915(b).

Rather than determine by statute what retroactive application to give the registration requirements, Congress vested in the Attorney General "the authority to specify the applicability of the requirements of [SORNA] to sex offenders convicted before the enactment of [SORNA] or its implementation in a particular jurisdiction." 42 U.S.C. § 16913(d). Since SORNA's enactment, the Attorney General—in interim and final rules and proposed and final guidelines published between 2007 and 2010[2]—has specified that the Act's requirements apply to all sex offenders whose convictions predate the enactment of the Act, even in jurisdictions that have yet to

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[2] *See* Interim Rule, 72 Fed. Reg. 8894, 8896 (Feb. 28, 2007) ("SORNA applies to all sex offenders (as the Act defines that term) regardless of when they were convicted."); Proposed Guidelines, 72 Fed. Reg. 30,210, 30,212 (May 30, 2007) ("SORNA's requirements apply to all sex offenders, including those whose convictions predate the enactment of the Act."); Final Guidelines, 73 Fed. Reg. 38,030, 38,063 (July 2, 2008) ("SORNA applies to all sex offenders, including those convicted of their registration offenses prior to the enactment of SORNA or prior to particular jurisdictions' incorporation of the SORNA requirements into their programs."); Final Rule, 75 Fed. Reg. 81,849, 81,850 (Dec. 29, 2010) (finalizing the interim rule "to eliminate any possible uncertainty or dispute concerning the scope of SORNA's application").

implement it.[3] We have held that SORNA became applicable to pre-Act offenders at the latest when the Attorney General's final guidelines took effect. *See United States v. Lott*, 750 F.3d 214, 217 (2d Cir. 2014). This occurred on August 1, 2008, thirty days after the final guidelines were published. *See* 5 U.S.C. § 553(d) (providing that, subject to certain exceptions not applicable here, "[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date").[4]

B. Factual Basis for Gundy's Indictment

In October 2005, Herman Gundy was convicted of violating Maryland Criminal Law § 3–306, Sexual Offense in the Second Degree. He was sentenced to twenty years' imprisonment (with ten years

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[3] SORNA does not require registration, however, by offenders who "have been in the community for a greater amount of time than the registration period required by SORNA." 73 Fed. Reg. at 38,046–47.

[4] The guidelines themselves identify their "Effective Date" as July 2, 2008, the date they were published in the Federal Register. *See* 73 Fed. Reg. at 38,030. But 5 U.S.C. § 553(d) creates an exception to the thirty-day prior publication requirement only for "(1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretive rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule." None of these exceptions applies: The final guidelines do not grant or recognize an exemption or relieve a restriction. They are substantive, not interpretive, rules. *See Lott*, 750 F.3d at 217-19. And the Attorney General "provided no statement of reasons to establish 'good cause.'" *United States v. Utesch*, 596 F.3d 302, 311 n. 8 (6th Cir. 2010). Indeed, in these proceedings, the government itself has conceded that the effective date of the final guidelines was August 1, 2008. *See* Appellant's Br. 20 n.4.

suspended), to be followed by five years' probation. When he committed the offense that was the basis for his Maryland conviction, Gundy was already subject to the supervision of the United States District Court for the District of Maryland in relation to an earlier federal conviction. Committing the Maryland offense violated the terms of his federal supervised release. In March 2006, Gundy pleaded guilty to the supervised release violation and was sentenced to twenty-four months' imprisonment for that offense, to be served consecutively to the Maryland sentence.

About four and a half years later, in November 2010, Gundy was transferred from the custody of the State of Maryland to the custody of the Federal Bureau of Prisons to serve his federal sentence for violating his supervised release. But he remained in Maryland, apparently still in a state facility notwithstanding his federal custody.

Federal authorities eventually transferred Gundy to FCI Schuylkill in Minersville, Pennsylvania. In March 2012, toward the end of his federal sentence and in preparation for his release, Gundy signed a "Community Based Program Agreement" authorizing the Department of Justice to make arrangements for his transition into community-based custody. Three months later, Gundy was ordered to be transferred to the Bronx Residential Re–Entry Center, a halfway house in New York. At his request, Gundy was granted a furlough to travel, unescorted, on July 17, 2012, from FCI Schuylkill to the Bronx. In his furlough application, Gundy acknowledged, among other things:

> I understand that if approved, I am authorized to be only in the area of the destination shown above and at ordinary stopovers or points on a direct route to or from that destination. I understand that my furlough only extends the limits of my confinement and that I remain in the custody of the Attorney General of the United States. If I fail to remain within the extended limits of this confinement, it shall be deemed as escape from the custody of the Attorney General . . . .

Ex. H to Decl. of Assistant U.S. Att'y Emil J. Bove III.

Gundy traveled from FCI Schuylkill to the Bronx Residential Re-Entry Center on July 17 as planned. On August 27, 2012, after completing his stay in the halfway house, Gundy was released from federal custody to a residence in the Bronx.

The government contends that, contrary to SORNA's requirements, Gundy registered in neither Maryland nor New York. On January 7, 2013, a grand jury returned an Indictment against Gundy in the United States District Court for the Southern District of New York charging him, under 18 U.S.C. § 2250, with being required to register under SORNA; traveling interstate from Pennsylvania to New York; and then failing to register as required.

C. District Court Proceedings

In March 2013, Gundy moved in the District Court to dismiss the Indictment for failure to state an offense. *See* Fed.R.Crim.P. 12(b)(3)(B)(v). Gundy argued principally that he was required to register only after the alleged interstate travel between

Pennsylvania and New York, and thus could not have violated § 2250(a), the elements of which must be satisfied sequentially. The District Court agreed with Gundy and granted his motion.

In granting the motion, the court rejected the government's contention that Gundy, who was convicted of a covered crime before SORNA's enactment in 2006, was "required to register" as soon as SORNA became retroactive. The court interpreted 42 U.S.C. § 16913(b)(1)—which provides that a "sex offender shall initially register ... before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement"—as demonstrating that Gundy was "required to register" under 18 U.S.C. § 2250(a)(1) only "shortly before he was released from custody in New York," and after he had traveled interstate, *United States v. Gundy*, No. 13 Crim. 8 (JPO), 2013 WL 2247147, at *6, *13 (S.D.N.Y. May 22, 2013).

Accounting for the fact that the sentence Gundy was serving immediately before his release in New York was for violating the terms of his federal supervised release, and not for the Maryland sexual assault, the District Court held that the federal sentence was also "a sentence of imprisonment with respect to" Gundy's sex offense. *See id.* at *11-12. In a motion for reconsideration, the government argued for the first time that Gundy was nevertheless required to register at the latest before he completed his Maryland sentence pursuant to 42 U.S.C. § 16913(b)(1), because the language of the statute states that a sex offender must register "before completing *a* sentence of imprisonment," in the singular (emphasis added).

The District Court denied the government's motion, concluding that this argument was waived, but also rejecting it on the merits due to considerations of "statutory purpose and the rule of lenity." *United States v. Gundy,* No. 13 Crim. 8 (JPO), 2013 WL 4838845, at *2-3, *6 (S.D.N.Y. Sept. 11, 2013). The government now appeals the court's orders.

DISCUSSION

Since the Indictment's dismissal raises questions of law, our review is *de novo. See United States v. Alfonso,* 143 F.3d 772, 775 (2d Cir. 1998).

The government argues that the Indictment should be reinstated because Gundy was "required to register" under SORNA from the moment he was designated a "sex offender" under the Act—at the latest, August 1, 2008, when the Attorney General's final guidelines on retroactivity became effective. According to the government, § 16913(b)—upon which the District Court principally relied—"does not purport to determine when an individual incurs an obligation to register under SORNA, [but] only when there has been a failure to make an initial registration as required by the statute." Appellant's Br. 21. The government argues, in the alternative, that even accepting Gundy's contrary contention that § 16913(b) specifies when a sex offender first is required to register, Gundy would have been required to register at the latest as of November 30, 2010, when he was released from Maryland custody into the custody of the Federal Bureau of Prisons. Under either interpretation, Gundy became a person "required to register" before his July 17, 2012 trip from Pennsylvania to New York.

We agree with the government's first argument that Gundy was a person "required to register" from the time SORNA became retroactive. A person is "required to register" under SORNA "[o]nce [that] person becomes subject to SORNA's registration requirements." *Carr*, 560 U.S. at 447. For Gundy, who was convicted of a sex offense in 2005, before SORNA's July 2006 effective date, the registration requirements attached at the latest on August 1, 2008, the effective date of the Attorney General's final guidelines, *see Lott*, 750 F.3d at 217; 5 U.S.C. § 553(d).

Gundy contends that he was not subject to SORNA's registration requirements at all until shortly before his 2012 release from federal custody. In urging this position, he relies principally on § 16913(b), which provides (as relevant here) that a "sex offender shall initially register ... before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement." 42 U.S.C. § 16913(b)(1). Gundy points to subsection (b)'s reference to "initial" registration and reasons that a person cannot be "required to register" before that person is required *initially* to register.

Although § 16913(b) undoubtedly regulates initial registration, we disagree that this means that § 16913(b) also regulates when registration requirements attach. It is our view that § 16913(b) is most naturally read to set deadlines for initial registration, not to establish the conditions that make registration mandatory. The provision is worded in terms of cutoff dates rather than beginning points: Thus, subsections (b)(1) and (2) direct that an offender sentenced to a term of imprisonment must initially register "*before* completing a sentence of

imprisonment with respect to the offense giving rise to the registration requirement," and that an offender not sentenced to a term of imprisonment must register "*not later than 3 business days after* being sentenced for that offense." 42 U.S.C. § 16913(b)(1), (2) (emphases added).

Gundy does not dispute this reading of the statute. Instead, he argues that there can be no "require[ment] to register" until an offender has reached a registration deadline. But this argument gives insufficient weight to the fact that § 2250(a) treats being "required to register" and "fail[ing] to register or update a registration as required" as separate and distinct elements of the criminal offense. 18 U.S.C. § 2250(a)(1), (3). The temporal relationship between these elements—the first necessarily is satisfied before the second, *see Carr*, 560 U.S. at 446—establishes that a person can be "subject to SORNA's registration requirements," *id.* at 447, before he or she is subject to immediate sanction for "fail[ing] to register," 18 U.S.C. § 2250(a)(3).[5] Section 16913(b) does not regulate when registration requirements attach.

Gundy argues, *inter alia*, that the government's interpretation of when registration requirements

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[5] Gundy's argument is also in tension with his assertion that he was required to register "shortly before" his release from custody. Were the government "simply wrong in asserting that 'a person can be required to register under a statute for a period of time prior to that person's deadline for completing that registration process,'" Appellee's Br. 24 (quoting Appellant's Br. 23), there would be no period of time before the deadline—however "short"—during which a person would be subject to a registration obligation.

attach undermines SORNA's purposes, contradicts Supreme Court precedent, and ignores other provisions of the Act. We find none of his arguments persuasive.

SORNA was enacted in part "to address the deficiencies in prior law that had enabled sex offenders to slip through the cracks." *Carr*, 560 U.S. at 455. According to Gundy, permitting sex offenders to satisfy their initial registration requirements by initially registering long before their release would, contrary to this purpose, enable "offenders ... easily [to] abscond following their release from prison, before they had registered their community address." Appellee's Br. 28. This argument ignores that a sex offender, having initially registered, remains subject to SORNA's registration requirements and is required "not later than 3 business days" after a change in residence to update his or her registration information. 42 U.S.C. § 16913(c). Such an offender who initially registers and is then released from custody is in a position similar to that of a sex offender who is not sentenced to a term of imprisonment and must initially register "not later than 3 business days after being sentenced for that offense." *Id.* § 16913(b)(2). In either case, the sex offender is "required to register"; should he or she leave the state of conviction and thereafter fail to register, a federal criminal penalty may be imposed. In contrast, were the Court to adopt Gundy's position that a sex offender is "required to register" only upon the arrival of the offender's initial registration deadline, an offender not sentenced to a prison term—and thus, in Gundy's view, "required to register" 3 business days after sentencing—would not be subject to a federal criminal

penalty if he or she left the state on the day of sentencing and thereafter failed to register. The travel would have occurred before the offender was "required to register," precluding prosecution. *See Carr,* 560 U.S. at 446. This result certainly would run counter to SORNA's purpose.

Gundy's attempt to use *Carr v. United States,* 560 U.S. 438 (2010), to challenge the government's position is not persuasive. In *Carr,* the Supreme Court faced the question whether a defendant who had both been convicted of a sex offense and traveled interstate before SORNA's enactment could be convicted under § 2250(a) for failure to register. *See id.* at 442. S.Ct. The Court concluded that he could not. *See id.* at 458. In reaching this conclusion, the Court agreed with the defendant that the three elements of the crime necessarily would have had to occur after SORNA's effective date, rejecting the suggestion that being "required to register under [SORNA]" was merely "shorthand" for the status of having been convicted of a sex offense covered by SORNA. *Id.* at 446-47 (internal quotation marks omitted).

Gundy charges that the government's position here runs afoul of the *Carr* Court's holding that being "required to register" under SORNA "denotes a more specific meaning than being among a class of sex offenders, or having a prior sex offense conviction." Appellee's Br. 20. But the government's position, and the one we adopt here, is not that the set of persons who are "required to register" is equivalent to the set of persons who been convicted of a sex offense. Rather, it is that a sex offender is "required to register" once he or she is "subject to" SORNA's registration requirements. This can occur only after SORNA's

effective date, and after SORNA has been made applicable to that person. Gundy, for example, was convicted in 2005, before SORNA's effective date, and therefore was "required to register" not upon his conviction, but only once SORNA was made retroactively applicable to him. Further, the period of required registration does not necessarily persist indefinitely. A person for whom the statutorily prescribed registration period is complete is no longer subject to SORNA's registration requirements, even as he or she remains among the class of statutorily defined sex offenders. *See* 42 U.S.C. § 16915; 73 Fed. Reg. at 38,046–47.

Gundy points to the fact that the state has a duty to inform a sex offender of the registration requirements only "shortly before" his or her release from custody, 42 U.S.C. § 16917(a), as another reason to conclude that Gundy could not have been a person "required to register" until shortly before his release from federal custody consecutive to his state custody. But we have emphasized that SORNA's requirements for the states and for sex offenders are not necessarily interdependent: In *United States v. Hester,* 589 F.3d 86 (2d Cir. 2009) (per curiam), we held that the defendant's duty to register under SORNA was dependent neither on his actual knowledge of SORNA's requirements nor on the state's implementation of SORNA, *see id.* at 91-93; the application of the registration requirements cited in § 2250(a)(1) did not hinge on whether the state had provided notice of those requirements, *see id.* at 92. And in any case, the timing of the state's duty to provide notice is not random: An offender who is "required to register" under SORNA but does not

register is not vulnerable to any punishment until after the time at which the state incurs a duty to provide notice. This is because an offender cannot have "fail[ed] to" satisfy any SORNA requirement applicable to him or her until the deadline for satisfying that requirement has passed; for a sex offender sentenced to a term of imprisonment, the initial registration deadline is when he or she "complet[es] a sentence of imprisonment with respect to the offense giving rise to the registration requirement," 42 U.S.C. § 16913(b)(1).[6] That Congress required states to provide notice to sex offenders only shortly before their release from custody fails to demonstrate that Congress did not intend for sex offenders to be persons "required to register" from an earlier stage.

Further, any suggestion that Gundy could not have been a person "required to register" beginning in 2008 because registration would have been impossible for him to accomplish while in custody must be rejected. The statute expressly requires an offender sentenced to imprisonment to initially register while still in custody. *See* 42 U.S.C. § 16913(b)(1) (requiring a sex offender to register "before completing a sentence of imprisonment"). And the nature of the registration information that a sex offender must provide accounts for the possibility that a sex offender may not have a current place of employment or permanent residence. For example, § 16914(a) requires a sex offender to

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[6] Indeed, any offender designated as such based on a state law conviction does not violate § 2250(a)—and is not subject to *federal* criminal sanction—unless he or she fails to register after traveling interstate.

provide the name and address of any place where the sex offender "resides *or will reside*," or "is . . . *or will be*" an employee or student. *Id.* § 16914(a)(3)-(5) (emphases added). Notably, it is only after initial registration, to "[k]eep[ ] the registration current," that a sex offender must "appear in person" to provide information, *id.* § 16913(c); and the particular requirement to keep one's registration current in this way does not apply to sex offenders during any period of custody or civil commitment, *see id.* § 16915(a); 73 Fed. Reg. at 38,068.

In sum, Gundy was a person "required to register" under SORNA beginning at the latest on August 1, 2008, the effective date of the Attorney General's final guidelines. This date arrived well before his alleged travel from Pennsylvania to New York. The District Court thus erred in concluding that Gundy became a person "required to register" under SORNA only after traveling interstate.

Gundy urges us, to the extent we disagree with the District Court, to affirm the court's dismissal order on the alternative ground that the travel charged in the Indictment does not amount to "interstate travel" within the meaning of § 2250(a)(2)(B). Gundy notes that by virtue of his one-day travel agreement with the federal government, he remained in the custody of the Federal Bureau of Prisons when he traveled from Pennsylvania to New York to take up his residence in the halfway house. As a result, he argues, his travel fell outside the purview of § 2250(a)(2)(B). Gundy raised this issue before the District Court, but the District Court did not reach it. We leave it to the court on remand to decide in the first instance whether

dismissal of the Indictment is warranted on this other ground.

CONCLUSION

For the reasons above, we REVERSE the District Court's order dismissing the Indictment. We REMAND the cause to the District Court for reinstatement of the Indictment and for further proceedings consistent this opinion. Gundy's appeal from the District Court's order denying reconsideration is moot.

Approved: /s/
EMIL J. Bove III
Assistant United States Attorney

Before: HONORABLE GABRIEL W. GORENSTEIN
United States Magistrate Judge
Southern District of New York

UNITED STATES OF AMERICA - v. - HERMAN AVERY GUNDY, a/k/a "Herman Grundy," Defendant.	COMPLAINT Violation of 18 U.S.C. § 2250 COUNTY OF OFFENSE: NEW YORK

SOUTHERN DISTRICT OF NEW YORK, ss.:

NICHOLAS RICIGLIANO, being duly sworn, deposes and says that he is a Senior Inspector with the United States Marshals Service ("USMS"), and charges as follows:

COUNT ONE

From at least in or about July 2012, up to and including in or about October 2012, in the Southern District of New York and elsewhere, HERMAN AVERY GUNDY, a/k/a "Herman Grundy," the defendant, being an individual required to register under the Sex Offender Registration and Notification Act, who did travel in interstate commerce, knowingly did fail to register and update a registration as required by the Sex Offender Registration and Notification Act, to wit, GUNDY traveled from Pennsylvania to New York and thereafter resided in

New York without registering as a sex offender in New York.

(Title 18, United States Code, Section 2250.)

The bases for my knowledge and for the foregoing charge are, in part, as follows:

1. I am a Senior Inspector with the USMS. I am currently the Sex Offender Investigations Coordinator for the Regional Fugitive Task Force.

2. I have been personally involved in the investigation of this matter. This affidavit is based upon my conversations with other law enforcement agents and witnesses, my examination of reports and records, and my personal participation in the investigation. Because this affidavit is being submitted for the limited purpose of establishing probable cause, it does not include all the facts that I have learned during the course of my investigation. Where the contents of documents and the actions, statements, and conversations of others are reported herein, they are reported in substance and in part, except where otherwise indicated.

3. Based on my review of records relating to HERMAN AVERY GUNDY, a/k/a "Herman Grundy," the defendant, I have learned the following:

a. On or about July 11, 1994, GUNDY pleaded guilty in the Eastern District of Pennsylvania to one count of conspiracy to distribute cocaine base, in violation of Title 21, United States Code, Section 846 (the "Federal Conviction"). On or about February 5, 1996, GUNDY was sentenced based on this conviction principally to five years' imprisonment and five years

of supervised release. *See United States v. Herman Grundy, a/k/a "Gundy,"* No. 94 Cr. 117 (E.D. Pa.).

b. In or about the summer of 2004, jurisdiction over GUNDY's supervised release relating to the Federal Conviction was transferred from the Eastern District of Pennsylvania to the District of Maryland. *See United States v. Herman Grundy, a/k/a "Gundy,"* No . 04 Cr. 305 (D. Md.).

c. On or about October 3, 2005, GUNDY pleaded guilty in the Circuit Court for Washington County in Hagerstown, Maryland of Sexual Offense in the Second Degree, in violation of Maryland Criminal Law Section 3-306 (the "Maryland Conviction"). On the same day that GUNDY pleaded guilty, he was sentenced to 20 years' imprisonment (with 10 years of that sentence suspended) and five years of probation.

d. The October 3, 2005 judgment resulting from GUNDY's Maryland Conviction states, in pertinent part:

> As defined in Criminal Procedure Article, Section 11-701, and subject to [the] requirements of Section 11-701 to Section 11-721[,] Defendant to be registered as a . . . CHILD SEXUAL OFFENDER.

e. The "Probation/Supervision Order" entered in connection with GUNDY's Maryland Conviction states, as a "Special Condition[ ]" of GUNDY's probation, that he was to "Register . . . as [a] child sexual offender . . . under the provisions of Criminal Procedure Article Title 11, Subtitle 7." In or about October 2005, GUNDY signed a "Consent" at the

bottom of the "Probation/Supervision Order," which states, in pertinent part:

> I have read, or have had read to me, the above conditions of probation. I understand these conditions and agree to follow them.

f. On or about March 23, 2006, GUNDY was sentenced in the District of Maryland to 24 months' imprisonment for violating the terms of his supervised release in connection with the Federal Conviction. *See* Judgment in a Criminal Case, *United States v. Herman Grundy, a/k/a "Gundy,"* No. 04 Cr. 305 (D. Md. Mar. 24, 2006) (doc. no. 15). The violation of supervised release proceeding was based, in part, on GUNDY's Maryland Conviction.

g. On or about July 6, 2011, after completing the term of incarceration to which GUNDY was sentenced in connection with the Maryland Conviction, GUNDY was taken into the custody of the Bureau of Prisons ("BOP") and incarcerated at Federal Correctional Institution – Schuylkill ("FCI Schuylkill") in Minersville, Pennsylvania.

h. On or about July 17, 2012, GUNDY was released from FCI Schuylkill in Pennsylvania, and he traveled via mass transit to a federal halfway house in the Bronx, New York (the "Bronx Halfway House").

i. On or about August 27, 2012, GUNDY was released from the Brown Halfway House.

j. On or about September 13, 2012, the State of Maryland issued a warrant for GUNDY's arrest based on violations of the parole conditions resulting from GUNDY's Maryland Conviction (the "Maryland Warrant").

k. On or about October 24, 2012, pursuant to the Maryland Warrant, law enforcement personnel took GUNDY into custody in or around an apartment in the Bronx, New York (the "Bronx Apartment").

l. GUNDY is currently incarcerated in Maryland.

4. I have learned the following from the Case Manager at FCI Schuylkill who worked with HERMAN AVERY GUNDY, a/k/a "Herman Grundy," the defendant, while GUNDY was incarcerated at that facility:

a. GUNDY's Case Manager advised GUNDY that he was required to register as a sex offender in any state in which he resided after being released from FCI Schuylkill.

b. GUNDY reviewed and completed parts of a BOP form titled "BP-S648.051 Sex Offender Registration and Treatment Notification" (the "BOP Form"). On or about August 1, 2011, GUNDY signed Section A of the BOP Form, titled "INITIAL CLASSIFICATION." Section A of the BOP Form indicates that GUNDY has a "Prior conviction of [a] sexual offense" and states, in pertinent part:

> This is to notify you of your Public Safety Factor – Sex Offender classification pursuant to Bureau of Prisons Program Statement Security Designation and Custody Classification Manual.

c. On or about June 8, 2012, the Case Manager read to GUNDY Section B of the BOP Form, titled "FINAL PROGRAM REVIEW," which GUNDY refused to sign. Section B of the BOP Form indicates

that GUNDY has a "Prior conviction of [a] sexual offense" and states, in pertinent part :

> You are subject to registration as a sex offender in any state in which you reside, are employed, carry on a vocation, or are a student.

5. I have learned the following from a witness ("Witness-1") found in the Bronx Apartment where HERMAN AVERY GUNDY, a/k/a "Herman Grundy," the defendant, was taken into custody on or about October 24, 2012:

a. Witness-1 has lived in the Bronx Apartment since approximately 1991.

b. GUNDY moved into the Bronx Apartment in or about August 2012.

6. Historical cell site records relating to a cellular telephone found in the possession of HERMAN AVERY GUNDY, a/k/a "Herman Grundy," the defendant, when he was taken into custody on or about October 24, 2012, indicate that the cellular telephone was used consistently in the Southern District of New York between on or about September 24, 2012, and on or about October 22, 2012.

7. At my request, a clerk at the New York State Division of Criminal Justice Services, which maintains New York's Sex Offender Registry, performed a search of the Division's records. He found no records relating to a sex offender registration by HERMAN AVERY GUNDY, a/k/a "Herman Grundy," the defendant.

WHEREFORE, deponent prays that an arrest warrant be issued for HERMAN AVERY GUNDY,

a/k/a "Herman Grundy," the defendant, and that he be arrested and imprisoned, or bailed, as the case may be.

/s/
NICHOLAS RICIGLIANO
Senior Inspector
United States Marshals Service

Sworn to before me this
3rd day of December, 2012

/s/
HONORABLE GABRIEL W. GORENSTEIN
United States Magistrate Judge
Southern District of New York

JUDGE OETKEN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEAR YORK

UNITED STATES OF AMERICA - v. - HERMAN AVERY GUNDY, a/k/a "Herman Grundy," Defendant.	13 CRIM008 **INDICTMENT** Cr. USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC#: DATE FILED: JAN 07 2013

COUNT ONE

The Grand Jury charges:

From at least in or about August 2012, up to and including in or about October 2012, in the Southern District of New York and elsewhere, HERMAN AVERY GUNDY a/k/a "Herman Grundy," the defendant, being an individual required to register under the Sex Offender Registration and Notification Act, who did travel in interstate commerce, willfully and knowingly did fail to register and update a registration as required by the Sex Offender Registration and Notification Act, to wit, GUNDY traveled from Pennsylvania to New York and thereafter resided in New York without registering as a sex offender in New York.

(Title 18, United States Code, Section 2250.)

/s/ 1/7/13	/s/
FOREPERSON	PREET BHARARA United States Attorney

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, -against- HERMAN AVERY GUNDY, Defendant.	13 Crim. 8 (JPO) **OPINION AND ORDER**

J. PAUL OETKEN, District Judge:

Defendant Herman Avery Gundy was charged with one count of failing to register as a sex offender under the Sex Offender Registration and Notification Act ("SORNA"), 18 U.S.C. § 2250. On May 22, 2013, this Court granted Gundy's motion to dismiss the indictment, holding that Gundy was not subject to SORNA's registration requirements at the time of the interstate travel alleged by the Government. *United States v. Gundy*, No. 13 Crim. 8, 2013 WL 2247147 (S.D.N.Y. May 22, 2013) ("the Opinion"). Advancing new arguments, the Government now seeks reconsideration of the Opinion. Though responsive to some of the concerns addressed in the Opinion, these arguments do not succeed. For the reasons that follow, the motion for reconsideration is denied.

I. Legal Standard

"A motion for reconsideration is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *Drapkin v. Mafco Consol. Group, Inc.*, 818 F. Supp. 2d 678, 695 (S.D.N.Y. 2011) (quotation marks and citation omitted). Accordingly, "[t]he threshold for

prevailing on a motion for reconsideration is high." *Nakshin v. Holder*, 360 F. App'x 192, 193 (2d Cir. 2010); *see Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) ("The standard for granting such a motion is strict."). "Although the federal and local rules of criminal procedure do not specifically provide for motions for reconsideration, courts in this district have applied Local Civil Rule 6.3 in criminal cases." *United States v. Peterson*, No. 12 Crim. 409, 2012 WL 5177526, at *1 (S.D.N.Y. Oct. 19, 2012).

II. Discussion[1]

The Supreme Court has held that a person commits a violation of § 2250 only if he (1) is "required to register under [SORNA]"; (2) *subsequently* "travels in interstate or foreign commerce"; and (3) *subsequently* "knowingly fails to register . . . ." 18 U.S.C. § 2250; *see Gundy*, 2013 WL 2247147, at *3 (citing *Carr v. United States*, 560 U.S. 438 (2010)). In the Opinion, this Court concluded that the first element was not met until *after* Gundy traveled in interstate commerce. This is because, as the Court explained: (1) Gundy's duty to "initially register" under 18 U.S.C. § 16913 arose just before completion of "a sentence of imprisonment with respect to the offense giving rise to the registration requirement"; (2) Gundy's federal sentence for violation of supervised release ("VOSR") based on his Maryland conviction—which immediately followed his sentence on the Maryland conviction itself—was "a sentence of imprisonment with respect to the offense giving rise to the registration requirement" (namely, the Maryland

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[1] Familiarity with the Opinion and all other facts relevant to the case is presumed.

sex offense); and (3) Gundy did not complete that federal sentence until *after* he traveled in interstate commerce. *See Gundy*, 2013 WL 2247147, at *4-13.

A.

The Government's request for reconsideration opens with an argument that it did not advance in its original brief, at oral argument, or in its post-argument brief. This argument focuses on the third word of 18 U.S.C. § 16913(b)(1): "before completing *a* sentence of imprisonment with respect to the offense giving rise to the registration requirement." (emphasis added). In the Government's view, that single word controls this case: Because the sentence for his Maryland conviction was "a sentence of imprisonment," and because the statute refers to "a" sentence rather than "any" or "all" sentences, Gundy's duty to register attached on or before November 30, 2010—the date on which he completed the sentence for his Maryland conviction and thus, by implication, the date before which he was required to initially register. *See* § 16913 (b)(1). This is so, the Government argues, because he literally completed "*a* sentence of imprisonment with respect to the [sex] offense" on that date—even though he was not released and was immediately transferred to federal custody to begin serving *another* "sentence of imprisonment with respect to the [sex] offense."

This argument, although presenting a stronger textual basis for the Government's position than its previous arguments, must be rejected for several reasons.

First, motions for reconsideration are not the appropriate mechanism for advancing purportedly

dispositive arguments for the first time. As the Second Circuit has emphasized, "[g]enerally, motions for reconsideration are not granted unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Cioce v. County of Westchester*, 128 F. App'x 181, 185 (2d Cir. 2005). Accordingly, "a party may not advance new facts, issues, or arguments not previously presented to the Court." *Polsby v. St. Martin's Press, Inc.*, No. 97 Civ. 690, 2000 WL 98057, at *1 (S.D.N.Y. Jan. 18, 2000) (citation omitted). "Simply put, courts do not tolerate such efforts to obtain a second bite at the apple." *Goonan v. Fed. Reserve Bank of New York*, No. 12 Civ. 3859, 2013 WL 1386933, at *2 (S.D.N.Y. Apr. 5, 2013). By waiting until this late stage in the case, and failing to identify any new decision or data in support of its plain language interpretation, the Government has waived this argument.

Second, even on its own terms, the Government's argument does not rid § 16913(b)(1) of the ambiguity that required invocation of statutory purpose and the rule of lenity.

"As in any statutory construction case," analysis begins with the statutory text and "proceed[s] from the understanding that [u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013) (internal quotation marks and citations omitted). "The meaning of a word [or phrase] cannot be determined in isolation, but must be drawn from the context in which it is used.'" *United States v. Torres*, 703 F.3d 194, 199 (2d Cir.

2012) (quoting *In re Sept. 11 Prop. Damage Litig.*, 650 F.3d 145, 155 (2d Cir. 2011)); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law* 168 (2012) (noting that "statutory construction is a holistic endeavor"). "If the text of a statute [remains] ambiguous, then [the Court] must construct an interpretation consistent with the primary purpose of the statute." *United States v. Ripa*, 323 F.3d 73, 81 (2d Cir. 2003).

Section 16913(b) provides that a sex offender shall initially register "before completing a sentence of imprisonment . . . ." While the Government sees perfect clarity in this sentence, § 16913(b)(1) remains ambiguous in a crucial respect: by using the indefinite article to modify "sentence of imprisonment," Congress failed to distinguish between "any" and "a single." This distinction makes all the difference to Gundy.

As a matter of plain language, the Government's reading is certainly a legitimate one. Consider the sentence: "You must apply for kindergarten before completing a year of preschool." It is fairly obvious from the context of the sentence that "*a* year of preschool" is intended to mean "*a single* year of preschool." But consider the following directive from a doctor: "You must take one of these pills before finishing a meal" (or "Take one pill with a meal"). This is probably better read as meaning "before finishing *any* meal" (or "with *any* meal"). And consider the sentence: "You must stay out of the swimming pool until 15 minutes after eating a candy bar." Given the context, the better reading of this sentence is that it refers to *any* candy bar—and that if someone ate three candy bars consecutively, the 15-minute moratorium would be triggered by the eating of the *third* candy bar.

The meaning of "a" thus depends on context. *See, e.g., Hagen v. Nodak Mutual Insurance Co.*, No. 99 Civ. 3562, 2000 WL 35528125 (D.N.D. May 8, 2000) ("As a general principle the use of an indefinite article may create an inherent ambiguity, depending on how the indefinite nature of the article is interpreted."). Although statutory context can eliminate ambiguity, *see S.E.C. v. KPMG LLP*, 412 F. Supp. 2d 349, 388 (S.D.N.Y. 2006), nothing else in § 16913(b) settles the choice between these two meanings of "a." While Gundy had completed "a single" sentence of imprisonment when time expired on the sentence for his Maryland conviction, SORNA can also be read to impose a duty to register before completing "any" sentence of imprisonment. In the latter case, the most natural reading (or at least a possible reading) of § 16913(b) is one that requires a defendant like Gundy—sentenced to multiple, consecutive terms of imprisonment "with respect to" the offense giving rise to the registration duty—to register before completing his final sentence of imprisonment.[2] Given this ambiguity in the statutory text, the Court must consult statutory purpose and the rule of lenity. As explained in the Opinion, these factors cut strongly in Gundy's favor. *See* 2013 WL 2247147, at *8-12.

Third, the structure of the statutory text provides a simpler explanation for the statute's use of the word

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[2] As noted in the Opinion, the Guidelines promulgated by the Attorney General lend support to this reading. They state that "SORNA's registration requirements generally come into play *when sex offenders are released from imprisonment*, or when they are sentenced if the sentence does not involve imprisonment." *Gundy*, 2013 WL 2247147, at *9 (quoting 73 Fed. Reg. 38,030, 38,045) (emphasis added).

"a"—one that weakens the Government's textual argument.

The discussion thus far has assumed that the Government correctly framed the relevant question by focusing narrowly on § 16913(b)(1). It is a basic rule of interpretation, however, that each sub-section of a statute must be read in the context of the larger statutory structure. As its title indicates, § 16913(b) is concerned with the timing of initial registration. To that end, § 16913(b) contemplates two classes of offenders: those who have been sentenced to imprisonment, § 16913(b)(1), and those who received non-carceral sentences, § 16913(b)(2). When Congress referred to offenders who have completed "a sentence of imprisonment," it did so only to distinguish offenders who received "a sentence *of imprisonment*" from offenders who were "*not* sentenced to a term of imprisonment." (emphasis added). This perspective clarifies why Congress used the indefinite article in § 16913(b)(1): it was not concerned with (or apparently aware of any need for) specifying *which* sentence of imprisonment triggers the duty of initial registration, but rather with separating those offenders who have received a carceral sentence from those who have received a non-carceral sentence. Use of the indefinite article to describe these classes makes sense, whereas it would have been strange for Congress to use the indefinite article as its method of indicating when in time a duty of initial registration attaches. As a result, it would be erroneous to require "a" to bear all the weight the Government places on it. In statutory context, the word "a" simply does not bear on the question whether Gundy's initial registration duty attached at the end of his Maryland sentence.

Accordingly, the Government's first textual argument does not succeed.

B.

The Government's second argument for reconsideration focuses on "with respect to." In sum, the Government notes that "offense" is used throughout SORNA to refer to the crime of conviction resulting in a defendant's registration obligation—in this case, Gundy's Maryland sex crime. Emphasizing that a violation of supervised release is distinct from any underlying state offense, and that Gundy's VOSR sentence punished his "breach of trust," the Government argues that the two convictions cannot be said to be "with respect to" one another.

The Court has already addressed and rejected an essentially identical version of this argument. *See Gundy*, 2013 WL 2247147, at *7-8. The Government is mistaken in its suggestion that the Opinion treated the VOSR sentence as part of, or as an extension of, the Maryland sentence. *See id.* at *7-8, *11; *see also id.* at *11 n.2 ("The Government raises the specter of a constitutional concern with this conclusion, since postrevocation penalties relate to the initial offense—and would raise an issue of double jeopardy if they were treated as punishment for the new criminal offense. *See Johnson v. United States*, 529 U.S. 694, 700 (2000). But that concern is misplaced. Acknowledging that Gundy's sentence for violation of his supervised release is a sentence 'with respect to' his Maryland criminal offense is not the same as concluding that it constitutes punishment for that offense. In other words, the Court can recognize the reality of a relationship between Gundy's conduct in

Maryland and his post-revocation penalties without implicating the double jeopardy issue noted in *Johnson*. As a result, there is no need to construe 'with respect to' in the shadow of constitutional avoidance."). As the Court noted in the Opinion, the phrase "with respect to" connotes relationships other than identity. *Id.* at *8. Here, "the violation that caused [Gundy's] [VOSR] sentence consisted of exactly the same conduct that gives rise to his registration requirement." *Id.* Further, that conduct constituted a violation of the terms of Gundy's supervised release only because it was, in fact, prohibited by the criminal law—and the terms of Gundy's supervised release were keyed, in part, to compliance with that body of law. At the very least, SORNA's text is ambiguous as to whether his VOSR offense was an offense "with respect to" his Maryland conviction.

C.

The Government also argues that treating Gundy as having been "required to register" no later than November 30, 2010 is consistent with SORNA's purpose. The Court considered and rejected similar purpose-related arguments in the Opinion, concluding that SORNA's purpose—as expressed in Second Circuit and Supreme Court precedent, the statutory text, and the Attorney General's implementing regulations—cuts firmly in Gundy's favor. *See id.* at *8-12. The Government advances only one novel argument: given that SORNA requires offenders to register in the jurisdiction of their conviction, and that SORNA aims to ensure that authorities do not lose track of sex offenders, it would be consistent with SORNA's purpose to prefer a rule whereby sex

offenders register while incarcerated in the jurisdiction of their offense.

Even to the extent that this argument clarifies an aspect of SORNA, the core purposes and operation of the statute, as described in the Opinion, override this single factor. *See id.* at *9 ("Given that there is virtually no risk that a sex offender will fall through the cracks or go missing while incarcerated, it would make little sense to apply SORNA's registration requirements and criminal provisions to incarcerated individuals. In fact, Congress recognized that the public is adequately protected against sex offenders locked behind bars: this is why sex offenders are not required under § 16913(b) to initially register until the *end* of their post-conviction carceral sentences."); *id.* at *10 ("A clear focus on offenders outside of custody runs through SORNA's text and its implementing regulations."). So do the weighty considerations of fairness and federalism—unaddressed in the Government's brief—that the Opinion highlighted as critical to any understanding of SORNA. *See id.* at *10 ("Inmates are regularly moved between jurisdictions while in custody. Often, these transfers are orchestrated without their consent. Even if those inmates enjoyed an affirmative defense under § 2250(b) to liability under § 2250(a) for failure to register while imprisoned, the result would [be] that a significant number of inmates have already satisfied elements (1) and (2) of § 2250 the moment they step past prison gates on their way to freedom. Failure to register within a short period would then perfect the § 2250 offense and return them to federal prison for an offense that, in the usual course, would implicate only the requirements of state sex offender registration

schemes."); *id.* at *11 ("The Government's proposed interpretation of SORNA would [] result in a disruption of the state-federal balance contemplated by Congress, as it would federalize a large swath of post-custody failure-to-register offenses that do not reflect any uniquely federal power or concern . . . . Moreover, this disruption in federalism would arise in a context shot through with questions of fundamental fairness, since in many cases the predicate act of interstate travel would have been imposed on an unwilling sex offender—who might well be excused from recognizing that failure to register in his new state violates SORNA, instead of state law.").

In any event, the Government's arguments rest on questionable assumptions. It is not clear, for instance, why an offender's jurisdiction of conviction is "uniquely situated to know whether the offender has been convicted of a sex offense." When inmates are transferred within jurisdiction or to new jurisdictions, there is every reason to believe that information about their offense and post-conviction requirements travels with them. Every facility to which Gundy was transferred, for example, was well aware of his status as a sex offender—and the Government offers no concrete evidence for its suggestion that prison officials have a difficult time tracking sex offender status.[3]

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[3] There is little record evidence addressed to the question of why Gundy did not register as a sex offender when he completed his Maryland sentence—or to the question of why Maryland State officials, who the Government insists are in the best position to handle such matters, failed to ensure Gundy's registration. But the record is replete with evidence that federal officials *were* aware of Gundy's status as a sex offender and *did* remind him of

Further, if an inmate were transferred from state to state—or from facility to facility—after initially registering, he would still have to register at each new location to ensure that the jurisdiction of conviction did not lose track of him. As a result, the reading of SORNA advanced by the Government still involves a series of registrations as inmates are moved from prison to prison—and thus presupposes the adequacy of registration schemes across facilities as prisoners are moved from one to the next. While initial registration may be unique in some respects, the Government has not explained how and why that uniqueness compels a rule that imposes a duty of initial registration at the end of the first prison sentence with respect to the offense giving rise to the registration duty. More broadly, the Government has not identified any reason for concluding that the view of SORNA set forth in the Opinion would thwart full realization of SORNA's purpose. Accordingly, the Government's purpose-based arguments do not warrant reconsideration of the Court's decision.

D.

In his motion to dismiss the indictment, Gundy presented several additional arguments for dismissal of the indictment which the Court did not reach, including (1) that SORNA violates the Commerce Clause and (2) that Gundy cannot lawfully be found to have "traveled in interstate commerce" for purposes of

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his duty to register. The facts of this case thus suggest that, in at least some instances, officials in the jurisdiction of conviction will be less capable than officials in a jurisdiction to which an inmate is transferred of ensuring that the inmate complies with SORNA's registration requirements.

criminal liability because he was "in custody" at the time of his interstate travel. In light of the Court's decision to deny reconsideration, it is unnecessary to resolve these alternative arguments. It should be noted, however, that the Second Circuit recently considered a Commerce Clause challenge to SORNA based (like Gundy's challenge) on the Supreme Court's decision in the Affordable Care Act case, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) ("*NFIB*"). The Second Circuit declined to revisit a prior decision upholding SORNA under the Commerce Clause, "not because [the defendant's] arguments all lack force, nor because the constitutionality of SORNA—particularly when applied within the states—is beyond question . . . . , but because the constitutionality of SORNA *as applied to [the defendant]* remains unaffected by any limitations on Congress's Commerce Clause power that may be found in *NFIB*." *United States v. Robbins*, 2013 WL 4711394, at *1 (2d Cir. Sept. 3, 2013) (emphasis in original). Applying the distinction between regulation of "activity" and "inactivity" from NFIB,[4] the Second Circuit in *Robbins* concluded that, as applied to the defendant in that case, SORNA regulated "activity" — "his change of residence and travel across state

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[4] The *Robbins* court noted that it is unclear whether the discussion of the Commerce Clause in Chief Justice Roberts' primary opinion in *NFIB* constitutes "more than dicta," *id.* at *4, but assumed for the sake of the argument that the statements about the Commerce Clause in that opinion—including the significance of the activity-inactivity distinction—constitute a holding of the Court when joined with the consistent views of the four dissenting Justices, *id.*

lines"—and that such activity "directly employ[ed] the channels of interstate commerce." *Id.* at *4.

This case presents closer questions under that analysis. In particular, is it fair to say that Gundy "traveled across state lines" for purposes of this criminal statute and the Commerce Clause given that he was *in custody* when he did so? And in light of his custodial status, was he "employ[ing] the channels of interstate commerce" in doing so? As noted, it is unnecessary to resolve those questions here. To the extent that these questions present serious constitutional issues, however, the doctrine of constitutional avoidance provides yet another basis for this Court's interpretation of the statute as applied to this case. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (Brandeis, J., concurring).

III. Conclusion

For the foregoing reasons, the Government's motion for reconsideration is DENIED.

SO ORDERED.

Dated: New York, New York
September 11, 2013

/J. Paul Oetken/
J. PAUL OETKEN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, -against- HERMAN AVERY GUNDY, Defendant.	13 Crim. 8 (JPO) **MEMORANDUM AND ORDER**

J. PAUL OETKEN, District Judge:

Herman Avery Gundy is charged with one count of failing to register as a sex offender under the Sex Offender Registration and Notification Act, 18 U.S.C. § 2250. Gundy has moved to dismiss the Indictment. For the reasons that follow, his motion is granted.

I. Background

On July 11, 1994, Gundy pleaded guilty in the Eastern District of Pennsylvania to one count of conspiracy to distribute cocaine base, in violation of 21 U.S.C. § 846 ("the Federal Conviction"). On February 5, 1996, he was sentenced to five years' imprisonment and five years' supervised release. In 2004, jurisdiction over Gundy was transferred from the Eastern District of Pennsylvania to the District of Maryland.

On October 3, 2005, Gundy entered an *Alford* plea in a Maryland state court to the crime of Sexual Offense in the Second Degree ("the Maryland Conviction"). That same day, he was sentenced in Maryland state court to 20 years' imprisonment and five years' probation, with 10 years of the 20-year sentence suspended.

On March 23, 2006, Gundy appeared in the United States District Court for the District of Maryland and admitted to a violation of his federal supervised release based on the Maryland Conviction. He was sentenced to 24 months' imprisonment and the remainder of his supervised release was terminated. This sentence was to be served consecutively to his Maryland sentence.

On June 15, 2011, Gundy was transferred from the custody of Maryland to the custody of the Bureau of Prisons (BOP) to serve the sentence imposed by virtue of his violation of the terms of his supervised release. Ultimately, he was sent to FCI Schuylkill in Minersville, Pennsylvania.

On March 23, 2012, Gundy signed a "Community Based Program Agreement." The Agreement contemplated that he would become "a resident" of an unspecified "residential reentry center [RRC] or work release program." On May 8, 2012, he signed a form titled "Conditions of Furlough." On June 7, 2012, Gundy signed a "Furlough Application – Approval and Record," which indicated that the "[p]urpose of the visit" that he sought was "[p]lacement in [an] RRC" in the Bronx, New York. This application stated that the "Method of Transportation" would be "bus/taxi." On June 12, 2012, the warden of FCI Schuylkill approved Gundy's furlough. That day, the warden signed a "Transfer Order" authorizing Gundy's transfer from FCI Schuylkill to the Bronx Residential Re-Entry Center in the Bronx, New York ("the Bronx RRC"). Gundy acknowledged that:

> I understand that if approved, I am authorized to be only in the area of the destination shown

> above and at ordinary stopovers or points on a direct route to or from that destination. I understand that my furlough only extends the limits of my confinement and that I remain in the custody of the Attorney General of the United States.

The furlough conditions limited approval to Gundy's "remain[ing] in the legal custody of the U.S. Attorney General, in service to a term of imprisonment." The warden also signed a form stating that Gundy had been "authorized for unescorted commitment" to the Bronx RRC.

On July 17, 2012, Gundy traveled via Greyhound bus from Schuylkill Haven, Pennsylvania to New York City and reported to the Bronx RRC. He was released from the Bronx RRC on August 27, 2012. Upon being released from the Bronx RRC, Gundy remained in the Bronx. He did not register as a sex offender in either New York or Maryland.

On September 13, 2012, Maryland issued a warrant for Gundy's arrest based on violation of the conditions of his probation relating to the Maryland Conviction. On October 24, 2012, law enforcement personnel arrested Gundy in the Bronx and transferred him to the custody of Maryland. Gundy was later transferred to the custody of the BOP. On January 7, 2012, Gundy was charged in this District with one count of violating 18 U.S.C. § 2250.

II. Standard of Review

"Since federal crimes are solely creatures of statute, a federal indictment can be challenged on the ground that it fails to allege a crime within the terms

of the applicable statute." *United States v. Zahavi*, 12 Cr. 288, 2012 WL 5288743, at *1 (S.D.N.Y. Oct. 26, 2012) (quoting *United States v. Aleynikov*, 676 F.3d 71, 75-76 (2d Cir. 2012)); *see also* Fed. R. Crim. P. 12(b)(2) ("A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue."). "An indictment is sufficient when it charges a crime with sufficient precision to inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events." *United States v. Stavroulakis*, 952 F.2d 686, 693 (2d Cir. 1992).

III. Discussion

A. SORNA

On July 27, 2006, Congress enacted the Adam Walsh Child Protection and Safety Act of 2006 ("the Walsh Act"), Pub. L. No. 109-248, 120 Stat. 587. Title I of the Walsh Act codified SORNA, the declared purpose of which is to "protect the public from sex offenders and offenders against children . . . [by] establish[ing] a comprehensive national system for the registration of those offenders." 42 U.S.C. § 16901. Congress's principal purpose in enacting SORNA was "to make sure sex offenders could not avoid all registration requirements just by moving to another state." *United States v. Guzman*, 591 F.3d 83, 91 (2d Cir. 2010). As the Second Circuit has explained, "[r]equiring sex offenders to update their registrations due to intrastate changes of address or employment status is a perfectly logical way to help ensure that states will more effectively be able to track sex offenders when they do cross state lines." *Id.*

Title 18, United States Code, Section 2250(a) makes it a federal crime for certain sex offenders to violate SORNA's registration requirements. Section 2250 provides:

> (a) **In General.**— Whoever—
>
> (1) is required to register under [SORNA];
>
> (2)
>
> (A) is a sex offender as defined for the purposes of [SORNA] by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
>
> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
>
> (3) knowingly fails to register or update a registration as required by [SORNA];
>
> shall be fined under this title or imprisoned not more than 10 years, or both.
>
> (b) **Affirmative Defense.**— In a prosecution for a violation under subsection (a), it is an affirmative defense that—
>
> (1) uncontrollable circumstances prevented the individual from complying;
>
> (2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and

> (3) the individual complied as soon as such circumstances ceased to exist.

Read together, the subsections of § 2250 create criminal liability when the Government can prove three elements: (1) the defendant was required to register under SORNA; (2) the defendant traveled in interstate or foreign commerce; and (3) the defendant knowingly failed to register or update a registration as required by SORNA. "For a defendant to violate this provision . . . the statute's three elements must be satisfied in sequence, culminating in a post-SORNA failure to register." *Carr v. United States*, 130 S. Ct. 2229, 2235 (2010). Thus if a sex offender travels in interstate commerce and then fails to register before becoming subject to SORNA's registration requirements, he cannot be found guilty for violating § 2250(a).

In relevant part, SORNA's registration requirements are set forth in 18 U.S.C. § 16913:

> (a) **In general**
>
> A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) **Initial registration**

The sex offender shall initially register—

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) **Keeping the registration current**

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) **Initial registration of sex offenders unable to comply with subsection (b)**

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex

> offenders and for other categories of sex offenders who are unable to comply with subsection (b).

"Absent a valid rule by the Attorney General, SORNA is not retroactive to defendants . . . who were convicted of sex offenses requiring them to register before July 27, 2006." *United States v. Stevenson*, 676 F.3d 557, 560 (6th Cir. 2012); *see also Reynolds v. United States*, 132 S. Ct. 975, 984 (2012) ("[T]he Act's registration requirements do not apply to pre-Act offenders until the Attorney General so specifies" pursuant to 42 U.S.C. § 16913); *United States v. Herbert*, 09 Cr. 438, 2009 WL 4110472, at *3 (N.D.N.Y. Nov. 20, 2009) ("Congress delegated to the Attorney General the authority to define the retroactive application of SORNA's provisions to sexual offenders whose convictions occurred before the passage of SORNA by Congress or before the full implementation of SORNA by a given jurisdiction." (citing 42 U.S.C. § 16913)).

On February 28, 2007, the Attorney General promulgated an interim regulation providing that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 72 Fed. Reg. 8894-01 ("the Interim SORNA Regulation"). On August 1, 2008, the "SMART Guidelines" went into effect. The Guidelines provided that:

> The applicability of the SORNA requirements is not limited to sex offenders whose predicate sex offense convictions occur following a jurisdiction's implementation of a conforming registration program. Rather, SORNA's

> requirements took effect when SORNA was enacted on July 27, 2006, and they have applied since that time to all sex offenders, including those whose convictions predate SORNA's enactment.

73 Fed. Reg. 38,030. The Sixth Circuit has described the provenance of these guidelines:

> On May 30, 2007, the Attorney General published proposed guidelines from the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, called the SMART guidelines. The SMART guidelines stated that they were promulgated pursuant to the Attorney General's authority under 42 U.S.C. § 16912(b) to interpret and implement SORNA and restated the Attorney General's position that SORNA applied to all sex offenders, "including those whose convictions predate the enactment of the Act." 72 Fed. Reg. 30,210, 30,212. These guidelines were made open to comments until August 1, 2007. On July 2, 2008, the Attorney General published the final version of the SMART guidelines. 73 Fed. Reg. 38,030. In the final version, the Attorney General responded to comments regarding the issue of retroactivity, but kept the language the same. The final SMART guidelines stated their effective date as July 2, 2008, the date of publication.

Stevenson, 676 F.3d at 560; *see also United States v. Kidd*, 11 Cr. 20, 2011 WL 3352457, at *2-3 (E.D. Tenn. Aug. 3, 2011) *aff'd*, 12-5420, 2013 WL 870263 (6th Cir. Mar. 11, 2013). On January 28, 2011, without

conceding that the Interim Rule and the SMART Guidelines were invalid, the Attorney General responded to further comments on the issue of retroactivity and finalized the Interim Rule to dispel any doubts regarding SORNA's retroactivity. 75 Fed. Reg. 81,849, 81,850. This final regulation provided that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. § 72.3 ("the Final SORNA Regulation"). The Attorney General stated that the effective date of this latest final rule was January 28, 2011.

B. Whether Gundy Was "Required to Register" Under SORNA When He Traveled in Interstate Commerce

Gundy argues that the Indictment must be dismissed because he was not "required to register" under SORNA prior to when he crossed state lines by traveling from Pennsylvania to New York. He adds that he became subject to this duty only when he completed his continuous term of incarceration—at which point he was in New York. The Government disputes Gundy's arguments, insisting that Gundy has been subject to SORNA's registration requirements since SORNA was rendered retroactive. In the alternative, the Government might argue that Gundy became required to register under SORNA upon the completion of the sentence that he served in Maryland's prisons as punishment for the Maryland Conviction.

As an initial matter, the Government's suggestion that *every* sex offender has been subject to SORNA's

registration requirements, and "required to register" under SORNA, ever since the Attorney General issued regulations rendering SORNA retroactive, must be rejected. As the Supreme Court explained in *Carr* when presented with a similar argument:

> By its terms, the first element of § 2250(a) can only be satisfied when a person "is required to register *under the Sex Offender Registration and Notification Act*." § 2250(a)(1) (emphasis added). In an attempt to reconcile its preferred construction with the words of the statute, the Government insists that this language is merely "a shorthand way of identifying those persons who have a [sex-offense] conviction in the classes identified by SORNA." Brief for United States 19–20. To reach this conclusion, the Government observes that another provision of SORNA, 42 U.S.C. § 16913(a), states that the Act's registration requirements apply to "sex offender[s]." A "sex offender" is elsewhere defined as "an individual who was convicted of a sex offense." § 16911(1). Thus, as the Government would have it, Congress used 12 words and two implied cross-references to establish that the first element of § 2250(a) is that a person has been convicted of a sex offense. Such contortions can scarcely be called "shorthand." It is far more sensible to conclude that Congress meant the first precondition to § 2250 liability to be the one it listed first: a "require[ment] to register under [SORNA]."

130 S. Ct. at 2235-36. While *Carr* was focused on policing the line between pre-Act and post-Act offenders, its point is more generally applicable: the

status of being required to register under SORNA is not coextensive with the status of being a sex offender. Further, *Carr* must be taken as a caution that this first requirement—which sets in motion the sequence of events leading to criminal liability under § 2250—plays an essential role in the statutory scheme and has content independent of being subject *in general* to one or another of SORNA's requirements. *See id.* at 2238 ("Had Congress intended to subject any unregistered state sex offender who has ever traveled in interstate commerce to federal prosecution under § 2250, it easily could have adopted language to that effect."). Moreover, as explained *infra*, the Government's broad view of when a sex offender becomes required to register is incompatible with the statutory text.

Because SORNA was passed on July 27, 2006 and Gundy entered his *Alford* plea to the crime of Sexual Offense in the Second Degree in October 3, 2005, he is a pre-Act offender. The applicability of SORNA's registration requirements is therefore governed by § 16913(d), which authorizes the Attorney General to issue retroactivity guidelines. The Attorney General first did so on February 28, 2007 with the Interim SORNA Regulation, which provided that SORNA's requirements "apply to all sex offenders," including pre-Act offenders. He then promulgated the SMART Guidelines, which became effective on August 1, 2008 and stated that "SORNA's requirements took effect when SORNA was enacted on July 27, 2006, and they have applied since that time to all sex offenders, including those whose convictions predate SORNA's enactment." Courts have split over whether the Interim SORNA Regulation survives scrutiny as administrative action, *see United States v. Reynolds*,

710 F.3d 498, 507 (3d Cir. 2013), but the SMART Guidelines have consistently survived such challenges, *see United States v. Kimble*, No. 11 Cr. 611, 2012 WL 5906863, at *2 (W.D.N.Y. Nov. 26, 2012) (finding that "the SMART Guidelines established that SORNA became effective in 2008"); *United States v. Mullins*, No. 11 Cr. 103, 2012 WL 3777067, at *3 (D. Vt. Aug. 29, 2012) ("This Court has already followed every circuit to reach the question in holding that the Attorney General exercised his authority to declare the law applied to pre-Act offenders . . . when the SMART Guidelines took effect.").

Thus, at least as of August 1, 2008, while still serving his Maryland sentence, Gundy became subject to § 2250 and § 16913. *Stevenson*, 676 F.3d at 565 ("[T]he SMART guidelines can and do have the force and effect of law, and they establish that SORNA became retroactive as of August 1, 2008."). Section 16913(a), however, distinguishes between normal registration requirements and the initial registration requirement, providing that "a sex offender shall register . . . in each jurisdiction where the offender resides . . . . [and] *for initial registration purposes only*, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence" (emphasis added). Tracking this distinction, § 16913(b) provides that a "sex offender *shall initially register*—(1) *before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement*" (emphasis added). SORNA thus describes a general registration requirement and provides for an initial registration scheme. Any authority exercised by the

Attorney General pursuant to § 16913(d) would have rendered both § 16913(a) *and* § 16913(b) retroactive.

It would be nonsensical to conclude that Gundy was "required to register" under SORNA for purposes of § 2250(a)(1) *before* the date on which was required to "initially register" under § 16913. Therefore, a natural reading of § 16913(b)—together with other applicable law—suggests that Gundy's duty to register under SORNA did *not* become active on the date the SMART Guidelines took effect, on which date Gundy was serving his Maryland sentence. In other words, the SMART Guidelines did not render all pre-Act offenders immediately subject to a duty to register, such that the first element of SORNA will always be met for all pre- and post-Act sex offenders (also known as *all* sex offenders). Rather, as a pre-Act offender, Gundy became subject to SORNA's many requirements at least of the date the SMART Guidelines became effective. Those general requirements, however, include the specific requirement that a sex offender initially register "*before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement*" (emphasis added). This logic is confirmed by the SMART Guidelines, which explain that for sex offenders in prisoner populations at the time of SORNA's implementation, registration within the "normal SORNA time frame" means, as relevant here, "before release from imprisonment." 73 Fed. Reg. at 38,064. Gundy's sentence of imprisonment in Maryland for the sex offense to which he entered an *Alford* plea on October 3, 2005 plainly qualifies as a sentence covered by § 16913(b). Therefore, Gundy was

not required to register under SORNA at least until the end of that prison term.

The critical question, however, is whether Gundy's period of incarceration in Maryland, Pennsylvania, and New York for violation of the terms of his federal supervised release qualifies under § 16913(b) as a "sentence of imprisonment *with respect to* the offense giving rise to the registration requirement." If so, then Gundy did not become subject to SORNA's registration requirement until he was released from custody inside New York and Gundy's motion must be granted. If not, then Gundy became subject to SORNA's registration requirements at the end of the sentence imposed by Maryland's courts and his motion must be denied as to this argument.

The reading of § 16913(b) that best reconciles SORNA's text and purpose is that which *does* treat Gundy's sentence for violation of supervised release as "a sentence of imprisonment with respect to the offense giving rise to the registration requirement."

"As in any statutory construction case," analysis starts with the statutory text and "proceed[s] from the understanding that [u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Sebelius v. Cloer*, No. 12-236, 2013 WL 2149791, at *5 (U.S. May 20, 2013) (internal quotation marks and citations omitted). "If the text of a statute is ambiguous, then [the Court] must construct an interpretation consistent with the primary purpose of the statute as a whole." *United States v. Ripa*, 323 F.3d 73, 81 (2d Cir. 2003). Where a statutory ambiguity persists after examination of a statute's text, structure, and purpose,

the rule of lenity places a thumb on the scale against a finding of criminal liability. *See United States v. Santos*, 553 U.S. 507, 514 (2008). All three of these rules apply here.

As explained *supra*, § 16913(b) requires inmates to "initially register" after completing a prison term "*with respect to* the offense giving rise to the registration requirement." (emphasis added). This language, which is not addressed by SORNA's legislative history, is less than a model of clarity in specifying the required relationship between the "sentence of imprisonment" and the "offense giving rise to the registration requirement." The key term is "with respect to."

On the one hand, "with respect to" might be understood as "imposed as punishment for" the registration offense. On the other hand, "with respect to" might be understood in a broader sense as "relating to," "arising from," "regarding," or "in connection with." *See, e.g., American Heritage Dictionary* (4th ed. 2001) (defining "respect" as, *inter alia*, a verb that means "to relate or refer to; concern"); *Oxford English Dictionary* (2d ed. 1989) (identifying "with respect to" as definition I.4.e and cross-referencing to I.7.b., which defines "with respect" as meaning, *inter alia*, "[w]ith reference or regard *to* something" (emphasis in original)); *see also id.* (offering many definitions of "respect" that emphasize the relational character of this term, such as "1. *To have respect to*: a. To have regard or relation to, or connexion with, something . . . . b. To have reference, to refer, to something . . . 2. *To have respect to*: a. To turn *to*, refer *to*, for information . . . c. To give heed, attention, or consideration *to* something; to have regard *to*, to take into account).

Indeed, courts have made very different use of the term "with respect to." *See, e.g.*, *Magwood v. Patterson*, 130 S. Ct. 2788, 2806 (2010) (holding a habeas corpus application is "second or successive" for purposes of AEDPA where, "with respect to" a claim, the alleged error "could and should have" been raised in the first petition); *Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705 n.4 (2d Cir. 2013) (examining circumstances under which a person "is a fiduciary with respect to a plan" under ERISA, and noting that when an entity acts with "dual roles," fiduciary duties are only implicated when it functions in its capacity as a fiduciary). The common thread across these opinions and definitions is that "with respect to" connotes a connection with or relationship to, though not necessarily or even usually a state of identity with, the object of the phrase.

In most cases, this ambiguity in the meaning of "with respect to" will not matter. If a sex offender serves a prison sentence for the offense that creates the duty to register, and is then released from custody, his duty is activated at the end of his time in prison. If that sex offender is later caught and convicted of another crime, the question whether he is obligated to register while in prison does not implicate the initial registration issue that the parties dispute in this case.

Gundy's situation, however, directly implicates the ambiguity in § 16913(b)'s reference to a "sentence of imprisonment *with respect to* the offense giving rise to the registration requirement" (emphasis added). Unlike most offenders—and unlike the typical offender that Congress and the Attorney General likely imagined when crafting the applicable law—

Gundy completed a sentence of imprisonment for his Maryland sex offense and then *immediately* began a consecutive sentence of imprisonment for his violation of federal supervised release, a violation premised on the same underlying Maryland sex offense. This transition occurred while he was incarcerated in the same prison in Maryland; one day, he was in the same cell for a different reason. He was never released from prison. He was not even moved to a different prison, at least not initially. And the violation that caused his supervised release sentence consisted of exactly the same conduct that gives rise to his registration requirement. Gundy thus served back-to-back sentences for a single course of conduct—his sex offense—which simultaneously broke Maryland's criminal code and the terms of his supervised release.

On this fact pattern, the textual question is whether Gundy's time in prison for violating his supervised release in this manner qualifies as a sentence "with respect to" his Maryland sex offense. The answer is no if the text is read to mean "imposed as punishment for the offense giving rise to the registration requirement." The answer is yes if the text is read to mean "relating to," "arising from," or "in connection with" the offense giving rise to the registration requirement. The difference is thus all-important to Gundy, yet unsusceptible to resolution through analysis keyed only to the statute's plain language. The phrase "with respect to" is too ambiguous in this context to serve as the definitive predicate of Gundy's conviction.

A combination of statutory purpose and rule of lenity must therefore guide the outcome. Starting with purpose, SORNA's criminal provisions are "not a

stand-alone response to the problem of missing sex offenders." *Carr*, 130 S. Ct. at 2240. Rather, § 2250 is "embedded in a broader statutory scheme enacted to address the deficiencies in prior law that had enabled sex offenders to slip through the cracks." *Id.* That scheme includes provisions "repealing several earlier federal laws that also (but less effectively) sought uniformity; [] setting forth comprehensive registration-system standards; [] making federal funding contingent on States' bringing their systems into compliance with those standards; [] requiring both state and federal sex offenders to register with relevant jurisdictions (and to keep registration information current); and [] creating federal criminal sanctions applicable to those who violate the Act's registration requirements." *Reynolds*, 132 S. Ct. at 978.

Section 2250 thus plays a limited, though important, role in the larger SORNA scheme: "mak[ing] sure sex offenders could not avoid all registration requirements just by moving to another state." *Guzman*, 591 F.3d at 91. This is why "[t]he act of travel by a convicted sex offender may serve as a jurisdictional predicate for § 2250, but it is also, like the act of possession [under 18 U.S.C. § 922(g)], the very conduct at which Congress took aim." *Carr*, 130 S. Ct. at 2240. Thus, when sex offenders "use the channels of interstate commerce in evading a State's reach," their conduct implicates the animating purpose of SORNA's criminal provisions. *Id.* at 2238. Otherwise, however, Congress has given "the States primary responsibility for supervising and ensuring compliance among state sex offenders." *Id.*

Given that there is virtually no risk that a sex offender will fall through the cracks or go missing while incarcerated, it would make little sense to apply SORNA's registration requirements and criminal provisions to incarcerated individuals. In fact, Congress recognized that the public is adequately protected against sex offenders locked behind bars: this is why sex offenders are not required under §16913(b) to initially register until the *end* of their post-conviction carceral sentences. The Attorney General's SMART Guidelines confirm that "SORNA's registration requirements generally come into play *when sex offenders are released from imprisonment*, or when they are sentenced if the sentence does not involve imprisonment." 73 Fed. Reg. at 38,045 (emphasis added). The Guidelines add that "'imprisonment' as it is used in SORNA and these Guidelines refers to incarceration pursuant to a conviction, regardless of the nature of the institution in which the offender serves the sentence." *Id.*

This logic, which presupposes that there is little purpose to imposing a duty of initial registration on an incarcerated sex offender, appears again later in the SMART Guidelines:

> *Example 3*: A sex offender convicted in 1980 for an offense subject to lifetime registration under SORNA is released from imprisonment in 1990 but is not required to register at the time because the jurisdiction had not yet established a sex offender registration program. In 2010, following the jurisdiction's implementation of SORNA, the sex offender reenters the system because of conviction for a robbery. The jurisdiction will need to require

> the sex offender to register based on his 1980 conviction for a sex offense when he is released from imprisonment for the robbery offense. But it is not possible to carry out the initial registration procedure for the sex offender prior to his release from imprisonment for the registration offense—i.e., the sex offense for which he was convicted in 1980-because that time is past . . .
>
> . . . . In [cases like Example 3], the normal SORNA initial registration procedures and timing requirements will apply, but with the new offense substituting for the predicate registration offense as the basis for the time frame. In other words, such a sex offender must be initially registered in the manner specified in SORNA § 117(a) prior to release from imprisonment for the new offense that brought him back into the system, or within three business days of sentencing for the new offense in case of a non-incarcerative sentence.

73 Fed. Reg. at 38,063-64. Here, even though the offender would be incarcerated on a different offense than the offense giving rise to his duty to register, the Attorney General instructs states to view the initial registration requirement as one that arises at the *end* of the carceral sentence. This provision reflects SORNA's basic logic, which does not treat incarcerated sex offenders as a group subject to a duty of initial registration during their time in prison.

A clear focus on offenders outside of custody runs through SORNA's text and its implementing regulations. Section 16913 requires offenders to

register in each jurisdiction in which they reside, work, or study—requirements that all envision individuals outside of prison, free to go about their lives in multiple jurisdictions. Offenders are also required to periodically appear in person to keep their registration current, a mandate that further exemplifies Congress's presupposition that offenders with a duty to register are out of custody.

In the same vein, 42 U.S.C. § 16915(a) requires sex offenders to keep their "registration current for the full registration period (excluding any time the sex offender is in custody or civilly committed) unless the offender is allowed a reduction under subsection (b) of this section." Offenders are thus relieved of the obligation to keep their registration current while incarcerated—yet another feature of SORNA's registration scheme that indicates Congress's focus on out-of-custody offenders and its recognition that the purposes of SORNA's criminal provisions are not ordinarily fulfilled by imposing registration requirements on incarcerated offenders. *See also* 42 U.S.C. § 16914 (requiring that as part of registration, offenders provide information of a sort associated with being out of custody rather than imprisoned, including license plate numbers for any cars they drive and information about where they work). The SMART Guidelines accordingly recognize that "[t]he proviso relating to custody or civil commitment" in § 16915(a) "reflects the fact that the SORNA procedures for keeping up the registration . . . generally presuppose the case of a sex offender who is free in the community." They do so, the Guidelines explain, because "[w]here a sex offender is confined, the public is protected against the risk of his reoffending in a

more direct way, and more certain means are available for tracking his whereabouts. Hence, SORNA does not require that jurisdictions apply the registration procedures applicable to sex offenders in the community during periods in which a sex offender is in custody or civilly committed." 73 Fed. Reg. at 38,068.

Thus, as manifested in its statutory text and implementing regulations, SORNA's purpose is not ordinarily served by imposing on inmates who have not been released from prison following their sex offense conviction a duty of initial registration.[1]

In many cases, such a requirement could lead to absurd results. Inmates are regularly moved between jurisdictions while in custody. Often, these transfers are orchestrated without their consent. Even if those inmates enjoyed an affirmative defense under § 2250(b) to liability under § 2250(a) for failure to register while imprisoned, the result would that a significant number of inmates have already satisfied elements (1) and (2) of § 2250 the moment they step past prison gates on their way to freedom. Failure to register within a short period would then perfect the § 2250 offense and return them to federal prison for an offense that, in the usual course, would implicate only the requirements of state sex offender registration schemes.

The Government's proposed interpretation of SORNA would thus result in a disruption of the state-federal balance contemplated by Congress, as it would federalize a large swath of post-custody failure-to-

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[1] A different question may arise if an inmate is released from custody, spends time in society, and is then returned to prison, but that question is not presented by this motion.

register offenses that do not reflect any uniquely federal power or concern. *See Carr*, 130 S. Ct. at 2238 (noting that Congress has given "the States primary responsibility for supervising and ensuring compliance among state sex offenders"); *see also United States v. Van Buren, Jr.*, No. 8 Cr. 198, 2008 WL 3414012, at *13 (N.D.N.Y. Aug. 8, 2008) *aff'd sub nom. United States v. Van Buren*, 599 F.3d 170 (2d Cir. 2010) (noting that SORNA "does not offend traditional notions of federalism *because it addresses something each state does not have the power to accomplish*—track registered sexual offenders as they move from state to state." (emphasis added)). Moreover, this disruption in federalism would arise in a context shot through with questions of fundamental fairness, since in many cases the predicate act of interstate travel would have been imposed on an unwilling sex offender—who might well be excused from recognizing that failure to register in his new state violates SORNA, instead of state law. Ultimately, the Government's view would undercut the purpose and logic of SORNA's criminal liability provisions. As the Second Circuit recognized in *Guzman*, § 2250 is designed to make sure that sex offenders cannot dodge registration requirements by skipping from one state to another. 591 F.3d at 91. The interstate travel is thus the very act at which SORNA takes aim. *See Carr*, 130 S. Ct. at 2238-40. Where an inmate is in continuous carceral custody throughout his period of interstate travel, and is therefore being monitored by the government at every step along the way, it defies reason to view a post-release failure to register as an effort to "use the channels of interstate commerce in evading a State's reach." *Id.*

There is no reason to believe that all these considerations are any less decisive in Gundy's case. He was incarcerated continuously throughout his consecutive sentences. He did not present a danger that the government would lose him, that he would fall through the cracks, or that he would "use the channels of interstate commerce in evading a State's reach." *Carr*, 130 S. Ct. at 2238. He did not pose a danger to the community while in prison. He would have been required to register upon his release from custody wherever that release took place; there is no reason to believe that his failure to register after being released from custody in New York implicates SORNA's purposes any more than his failure to register would have done had he been released in Maryland. In either case, he could have been punished by the state government for failing to register, or by the federal government if he subsequently moved in interstate commerce and knowingly failed to register as required by SORNA. In sum, it would not advance any core purpose of SORNA to conclude that Gundy's supervised release sentence was *not* a sentence of imprisonment "with respect to" his Maryland sex offense. SORNA is not designed to ensure that prisoners can be arrested for a federal crime in the very state where they are released from prison for the first time after serving a sentence "with respect to" their sex offense.[2]

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[2] The Government raises the specter of a constitutional concern with this conclusion, since postrevocation penalties relate to the initial offense—and would raise an issue of double jeopardy if they were treated as punishment for the new criminal offense. *See Johnson v. United States*, 529 U.S. 694, 700 (2000). But that concern is misplaced. Acknowledging that Gundy's

This conclusion is bolstered by the rule of lenity. As Justice Scalia has explained:

> Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

Santos, 553 U.S. at 514. Section 16913 is sufficiently ambiguous that even experienced counsel would have been hard-pressed to explain to Gundy his potential liability for failing to register upon his release from the RRC in New York. Given that Congress has not spoken clearly, that the notice function associated with statutory criminal law was clouded by ambiguity, and that the purposes of SORNA weigh against the imposition of liability, a construction of SORNA that precludes liability here is required.

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sentence for violation of his supervised release is a sentence "with respect to" his Maryland criminal offense is not the same as concluding that it constitutes punishment for that offense. In other words, the Court can recognize the reality of a relationship between Gundy's conduct in Maryland and his post-revocation penalties without implicating the double jeopardy issue noted in *Johnson*. As a result, there is no need to construe "with respect to" in the shadow of constitutional avoidance.

The SMART Guidelines do not alter—and in fact support—this conclusion. In the Guidelines, the Attorney General states that "jurisdictions must normally require that sex offenders be initially registered before release from imprisonment for the registration offense." He adds that, under § 117(a) of SORNA, "initial registration procedures are to be carried out 'shortly before release of the sex offender from custody' . . . . [J]urisdictions should implement this requirement in light of the underlying objectives of ensuring that sex offenders have their registration obligations in mind when they are released." 73 Fed.Reg. at 38,063. The Attorney General later notes that if a pre-Act offender started his carceral sentence *before* SORNA took effect and is released on "completion of imprisonment" *after* SORNA takes effect, that offender "can be registered prior to release from imprisonment in the same manner as sex offenders convicted following the enactment of SORNA and its implementation by the jurisdiction." *Id.*

Each of these SMART Guidelines provisions expressly contemplates a scenario in which the sex offender at issue is released from custody at the end of his term of imprisonment for the "registration offense." Thus, jurisdictions must "normally" require registration at that point—a qualification that implies the existence of cases where the duty to register does *not* attach at the end of the sentence imposed as punishment for the registration offense. This is one such case, as Gundy's consecutive sentence makes him unlike the "normal" sex offender. Further, states must register an offender before he is "released from custody," on "completion of imprisonment," or on "release from imprisonment." This language further

supports the conclusion that the Attorney General was not considering a situation like Gundy's in promulgating these rules. Even to the extent that Gundy was technically "released" from imprisonment for his registration offense when the basis for incarceration in Maryland shifted from a state crime to violation of supervised release, his continued presence behind bars removed him from the class of offenders contemplated by the plain terms of the SMART Guidelines. Thus, the SMART Guidelines arguably endorse Gundy's view of when he was required to register, since they repeatedly and logically link the initial registration requirement to release from custody.[3] In the alternative, they are ultimately silent as to this matter because it is not a "normal[ ]" case and the Court must look directly to § 16913(b)—the statute that the Attorney General is interpreting in the Guidelines.

The upshot of this analysis is that Gundy's duty to initially register was triggered shortly before he was released from custody in New York. Gundy was in custody when transferred from the Maryland prison to FCI Schuylkill, and then, by the plain language of the transfer documents, remained in the "legal custody of the [Attorney General], in service to a term of imprisonment" during his unsupervised transfer from Pennsylvania to New York. These documents confirmed that his transfer "only extend[ed] the limits

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[3] This analysis might be different if Gundy had been sentenced to consecutive prison terms for crimes that bore no relation—for instance, a sex offense and then an unrelated bank robbery—since in that scenario the robbery sentence might not qualify as a term of imprisonment "with respect to" to the sex offense. However, that issue is not presented in this case.

of [his] confinement" and his "custody." As a sex offender who was imprisoned for committing a sex offense and who then remained in custody continuously through his release in New York—first while serving a sentence imposed as punishment for the sex offense, and then while serving a post-revocation sentence "with respect to" the sex offense-Gundy was not "required to register" when he engaged in the interstate travel alleged in the Indictment and therefore cannot be held liable for a violation of § 2250.

Accordingly, the Indictment must be dismissed.

C. Gundy's Other Arguments In Support of Dismissal

Gundy also advances a number of other arguments in support of dismissal. Because the Court has granted his motion on statutory grounds, it need not reach his constitutional claims.

IV. Conclusion

For the foregoing reasons, Defendant's motion to dismiss the indictment is GRANTED.

SO ORDERED.

Dated: New York, New York
May 22, 2013

[J. Paul Oetken]
J. PAUL OETKEN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, -v.- HERMAN AVERY GUNDY, a/k/a HERMAN GRUNDY, Defendant.	13 Cr. 08 (JPO) [TRANSCRIPT] March 2, 2016 2:40 p.m.

Before:

J. PAUL OETKEN,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
BY: EMIL BOVE
Assistant United States Attorney

FEDERAL DEFENDERS OF NEW YORK, INC.
Attorneys for Defendant
BY: MARK GOMBINER

* * *

[12:9]

THE COURT: Okay. I think I understand the arguments and I am prepared to rule. I am going to go through and, for the record, cover all of the arguments that were previously made that I did not address in my earlier rulings. As I understand it, there are really a few different challenges. The first three I think are constitutional challenges.

First, defendant argues that SORNA violates his Fifth Amendment Due Process rights and I will just note that similar arguments have been rejected by the Second Circuit and this Court rejects those arguments for the same reasons as I am required to do under binding precedent including *United States v. Hester*, 589 F.3d 86 at 91-94 (2d Cir. 2009). I conclude that the defendant did have sufficient notice of his obligation to register to meet the requirements of due process and I will just reference docket no. 17 at pages 18 to 19 which summarizes the reasons for that.

Second, defendant argues that SORNA improperly [13] delegates legislative authority to the Attorney General. The Second Circuit has ruled, however, that Congress did not improperly delegate authority to the attorney general in violation of the non-delegation doctrine with respect to SORNA. That's *United States v. Guzman*, 591 F.3d 83 at 92 (2d Cir. 2010) and the motion is therefore denied on that ground.

Third, the defendant argues that SORNA violates the commerce laws including by regulating inactivity under the Affordable Care Act, *NFIB v. Sebelius*, 132 S. Ct 2566, 2012. However, the Second Circuit has made clear that the *NFIB* case does not alter the Court's earlier rejection of the commerce clause argument in *Guzman*. See, *United States v. Lott*, 750 F.3d 214 at 220 (2d Cir. 2014), and this argument is rejected under that line of Second Circuit cases.

Finally I will come to the argument that we have been discussing today. The defendant argues that the indictment should be dismissed because the travel charged in the indictment does not amount to interstate travel within the meaning of Section

2250(a)(2)(B) or, in a related vein, the defendant's travel does not meet the mental state or *mens rea* requirement or voluntariness requirement for such interstate custody because he was in custody at the time of the travel.

I conclude that the indictment adequately alleges for purposes of Rule 7 that the defendant traveled in interstate commerce. The fact that he did so pursuant to a furlough to a [14] residential re-entry center in the Bronx and that therefore was "in custody" as a legal matter, does not alter the fact that he actually traveled in interstate commerce. In other words, there is no exception for the custodial status as a statutory text matter. I see no persuasive reason to read into the law an exception for when the travel across state lines is pursuant to a granted furlough and his transportation to a halfway house at least where the defendant engages in such travel unescorted by means of private transportation such as a Greyhound Bus. I don't need to decide whether there are other circumstances that present more closer questions or more difficult questions.

Similarly, with respect to the purpose of the statute I do not – I am not persuaded that the purposes of sort of falling off the grid are not implicated in this situation where, as I said, there was a furlough situation and the defendant was traveling on a Greyhound Bus even though, concededly, he was in custody as a legal matter.

The Supreme Court's decision in *Carr v. United States* merely required the government to prove the following three things sequentially:

One, that the defendant was required to register;

Two, that he subsequently traveled in interstate commerce; and

Three, that he thereafter failed to register or update his registration.

[15]

The interstate travel charged in the indictment is consistent with the statute and with what is required by the Supreme Court's decision in *Carr*.

The only aspect of the issue that remains, I think, is whether there is some sort of voluntariness or *mens rea* requirement with respect to the interstate travel itself. I conclude that if there is a mental state requirement it is, at most, knowing with respect to the interstate travel element. That is what is required under Section 2250(a)(3) with respect to the failure to register requirement and that would be the correct and appropriate mental state requirement here as well to the extent that there is such a requirement. And there is enough charged in the indictment to make that a question for the jury at trial. It might be a different situation where someone is literally dragged across state lines or put into a trunk and might not be aware of what is happening but that is not the situation we have here. I think there is enough, certainly enough charged here to satisfy any mental state requirement which would be knowing.

For these reasons, the defendant's renewed motion to dismiss the indictment at docket no. 42, is denied.

That's my ruling on the pending motion and let me just turn now to any scheduling issues we need to address in light of that ruling.

* * *

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES of America,
Appellant,

v.

Jesus Manuel GUZMAN,
Defendant-Appellee.

United States of America,
Appellant,

v.

David Hall,
Defendant-Appellee.

Docket Nos. 08-5561-cr, 08-6004-cr
[Decided: Jan. 7, 2010 Amended: Jan. 8, 2010]

OPINION

WESLEY, Circuit Judge:

The government appeals from orders of the United States District Court for the Northern District of New York (Hurd, *J.*) dismissing the respective indictments of Appellees Jesus Manuel Guzman and David Hall ("Appellees") pursuant to 18 U.S.C. § 2250(a) for traveling in interstate commerce and failing to register and update their sex offender registrations as required by the Sex Offender Registration and Notification Act ("SORNA" or "Act"). Although it rejected all of Appellees' other challenges to SORNA, the district court held that the underlying registration requirements of 42 U.S.C. § 16913 exceed the authority of Congress to regulate interstate commerce. *United States v. Hall*, 577 F. Supp. 2d 610, 623 (N.D.N.Y. 2008); *United States v. Guzman*, 582 F.

Supp. 2d 305, 312 (N.D.N.Y. 2008); *United States v. Hall*, 588 F. Supp. 2d 326, 329 (N.D.N.Y. 2008) (denying reconsideration). We consolidate these cases solely for the purposes of this appeal. We agree with the district court that Appellees' other arguments in support of dismissal lack merit. However, we disagree with the district court's holding that 42 U.S.C. § 16913 exceeds congressional power pursuant to the Commerce Clause of the United States Constitution and therefore reverse the rulings of the district court and reinstate the indictments.

Background

Hall

On April 3, 2008, the government filed a criminal complaint against David Hall alleging that he traveled in interstate commerce and knowingly failed to register and update his registration as a sex offender under 18 U.S.C. § 2250(a).[1] According to the complaint, Hall pleaded guilty to Sexual Misconduct in violation of N.Y. Penal Law § 130.20 on May 25, 2006, and was sentenced to one year of incarceration. The sentencing judge designated Hall a Level 3 sex offender, meaning that he was required to register as a sex offender with New York and keep that registration up to date. An affidavit that accompanied

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[1] SORNA became law as Title I of the Adam Walsh Child Protection and Safety Act of 2006, Pub.L. No. 109-248, 120 Stat. 587 (codified at 42 U.S.C. §§ 16901 *et seq.*, 18 U.S.C. § 2250). The Act encompasses, but is not limited to, both 42 U.S.C. § 16913, the underlying sex offender registration requirement, and 18 U.S.C. § 2250, which criminalizes failure to register or update registration for those who cross state lines. We will refer to each section individually by its number where it is relevant and at times, for convenience, SORNA as a whole where it is not.

the April 3, 2008 criminal complaint states that, although Hall initially registered as required, an annual registration verification form sent by New York to his registered address in June 2007 was returned by the United States Post Office. According to the affidavit, Hall's whereabouts remained unknown to New York until February or March 2008, when Hall applied for benefits and informed the Cayuga County Department of Health and Human Services that he had been in Charlottesville, Virginia until moving back to Auburn, New York with his girlfriend on February 22, 2008. The affidavit further states that Virginia officials confirmed that Hall did not register as a sex offender in Virginia. A federal grand jury indicted Hall under 18 U.S.C. § 2250(a) on April 9, 2008.

Hall moved to dismiss the indictment on the grounds that SORNA: (1) does not apply in his case because neither New York nor Virginia have implemented the terms of SORNA as required by 42 U.S.C. § 16912, and the United States Attorney General did not make SORNA retroactive; (2) violates the Ex Post Facto and Due Process Clauses as applied to him because it has not been implemented by New York or Virginia; (3) exceeds Congress's power under the Commerce Clause; (3) encroaches on powers reserved to the states by the Tenth Amendment; and (4) violates the congressional non-delegation doctrine.

On September 23, 2008, the United States District Court for the Northern District of New York dismissed the indictment. *Hall,* 577 F. Supp. 2d at 623. The district court rejected Hall's argument that non-implementation of SORNA by New York and Virginia precludes prosecution because, contrary to the

defendants' assertions, the Attorney General has specified that SORNA applies to sex offenses predating its enactment regardless of whether SORNA has been implemented by the relevant jurisdictions. *Id.* at 614-15 (citing 28 C.F.R. § 72.3 and 72 Fed.Reg. 30,228 (May 30, 2007)). The district court also concluded that Hall's ex post facto challenge was misplaced because § 2250 punishes knowing failure to register when moving between states and does not impermissibly increase the punishment for his underlying sex offense conviction. *Id.* at 615-16.

The district court was equally unconvinced by Hall's argument that requiring him to register violated his due process rights because it was impossible for him to have registered under SORNA when the relevant states have not yet implemented the statute's registration requirements. The court reasoned that, regardless of state implementation, Hall "could have fulfilled his obligation to register as a sex offender under SORNA by providing the [existing] Virginia and New York sex offender registries with the required information upon changing his residence." *Id.* at 616.

The district court rejected Hall's Tenth Amendment argument because Hall could not show that either New York or Virginia made any changes to their laws in order to comply with SORNA. *Id.* at 616-17. Because the states did not take the actions required by SORNA, the district court reasoned, their officials were not unconstitutionally commandeered into implementing federal law. *Id.* at 617. The district court further concluded that Congress had not impermissibly delegated its legislative authority to the Attorney General by enacting SORNA because the Act provided the Attorney General with an "intelligible

principle" to follow by granting only the "limited authority to determine the retroactive application of SORNA's registration requirements to individuals convicted of sex offenses prior to SORNA's enactment." *Id.* at 617-18.

The district court nevertheless dismissed the indictment. It determined that Congress overstepped its authority to regulate interstate commerce in enacting SORNA. *Id.* at 622. Although the district court held that § 2250(a)—which criminalizes travel in interstate commerce without updating one's registration under SORNA-does not run afoul of the Commerce Clause under *United States v. Lopez*, 514 U.S. 549 (1995), or *United States v. Morrison*, 529 U.S. 598 (2000), *see Hall*, at 577 F. Supp. 2d at 619, it concluded that the *underlying* SORNA registration requirement, 42 U.S.C. § 16913, is unconstitutional because "it lacks a jurisdictional element restricting its application to individuals who travel in interstate commerce." *Hall*, 577 F. Supp. 2d at 620. Because § 16913 requires registration when changing address, employment, or student status, without regard to state lines, the district court determined that the section was sustainable only if it regulated an activity substantially affecting interstate commerce. The court held it does not. *Id.* at 621-22. The district court then rejected the government's attempt to justify § 16913 via Congress's spending power, reasoning that SORNA's registration requirements were not predicated upon any action being taken by a state. *Id.* at 622. The district court dismissed the indictment because a conviction under § 2250 would necessarily rely on the registration requirement that it had determined was unconstitutional.

Guzman

On October 2, 2008, the government filed a superseding indictment in the Northern District of New York alleging that "[f]rom in or about May, 2007 through in or about April, 2008" defendant Jose Manuel Guzman traveled in interstate commerce and knowingly failed to register or update his SORNA registration in violation of 18 U.S.C. § 2250(a). According to a May 12, 2008 affidavit, following two convictions in New York, Guzman was designated a Level 2 sex offender and required as a matter of New York law to register and to keep his registration up to date. The affidavit further states that a June 2007 annual verification form sent by New York to Guzman's address was returned by the United States Post Office, and in February 2008 the United States Marshals in Syracuse received information indicating that Guzman was residing in Lawrence, Massachusetts. According to the affidavit, Guzman did not register as a sex offender in Massachusetts. He was arrested on April 29, 2008, and federally indicted.

Guzman's case was assigned to the same district judge who had previously dismissed Hall's indictment. Guzman moved for dismissal, and on October 17, 2008, the district court issued a decision dismissing the indictment. As in its decision in *Hall,* the district court rejected all of Guzman's arguments in support of dismissal, except for his argument that § 16913 exceeds Congress's authority under the Commerce Clause. *Guzman*, 582 F. Supp. 2d at 315. The court rejected the government's argument that § 16913 regulates activity that substantially affects interstate commerce in the aggregate, *see Wickard v. Filburn*, 317 U.S. 111 (1942) and *Gonzales v. Raich*, 545 U.S. 1

(2005), because it regulates an activity that is not economic in nature. *Guzman*, 582 F. Supp. 2d at 310-13. Similarly, the court rejected the government's argument regarding the aggregate economic "cost of crime" as foreclosed by the Supreme Court in *Lopez*. *Id.* at 311; *see also Lopez*, 514 U.S. at 563-66. The district court also held that the statute was not saved by the Necessary and Proper Clause as an integral part of a broader regulatory scheme, because "the [Necessary and Proper C]lause may not be used to sustain the regulation of intrastate activity having an insufficient effect upon interstate commerce if the more general statutory objective is outside the scope of the constitution." *Guzman*, 582 F. Supp. 2d at 313.

Discussion

The provisions of SORNA relevant to this appeal are fairly straightforward. Under 426 U.S.C. § 16913(a), a convicted sex offender must register "and keep the registration current, in each jurisdiction where the offender resides, . . . is . . . employ[ed], [or] is a student." With respect to initial registration, a sex offender must also register in the jurisdiction of conviction if it is not the offender's jurisdiction of residence. *Id.* For initial registration purposes, § 6913(b) provides that the individual must register "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement" or "not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment." Section 16913(c) requires the registrant to inform at least one of the relevant jurisdictions of all relevant updates to his or her registration information within three days of a "change of name, residence, employment, or

student status." The jurisdiction so informed must then share that information with other jurisdictions where the offender is required to register. *Id.*; *see also id.* § 16921(b)(3). Section 16913(d) gives the United States Attorney General "the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before [SORNA's enactment on July 27, 2006] or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section."

Under SORNA's criminal enforcement provision, 18 U.S.C. § 2250(a), if an individual who is required to register knowingly fails to register or keep the registration information current, the offender is subject to a fine, imprisonment, or both. However, in order for criminal liability to attach, the offender must "travel[ ] in interstate or foreign commerce, or enter[ ] or leave[ ], or reside[ ] in Indian country," or the offender's registration requirement must derive from "a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States." *Id.* § 2250(a)(2).

Other SORNA provisions require jurisdictions to maintain sex offender registries in conformance with the Act, and empower the United States Attorney General to issue guidelines and regulations interpreting and implementing the Act. 42 U.S.C. § 16912(a), (b). SORNA provides for a reduction in federal funding related to law enforcement for those

jurisdictions failing to "substantially implement" SORNA. 42 U.S.C. § 16925.

Guzman and Hall make virtually identical arguments urging us to affirm the district court's holding that the national sex offender registration requirements in § 16913 exceed Congress's constitutional authority to legislate pursuant to the Commerce Clause. They further contend that § 2250(a) similarly violates the Commerce Clause. We find neither of these contentions convincing, and are equally unpersuaded by the other constitutional arguments rejected by the district court.

Commerce Clause

The Constitution grants Congress the power "[t]o regulate Commerce ... among the several States." U.S. Const. art. I, § 8, cl. 3. The current framework for approaching questions of the scope of congressional authority to regulate interstate commerce derives from the Supreme Court's opinion in *United States v. Lopez*, 514 U.S. 549 (1995). *Lopez* broke down the Commerce Clause inquiry into three categories of congressional regulatory authority: (1) "[to] regulate the use of the channels of interstate commerce"; (2) "to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "to regulate those activities having a substantial relation to interstate commerce." *Id.* at 558-59. In *United States v. Morrison*, the Supreme Court provided further guidance regarding the final category, articulating four factors to be weighed in determining whether an activity substantially affects interstate commerce: (1)

whether the regulated activity is economic in nature; (2) whether the statute contains an "express jurisdictional element" linking its scope in some way to interstate commerce; (3) whether Congress made express findings regarding the effects of the regulated activity on interstate commerce; and (4) attenuation of the link between the regulated activity and interstate commerce. 529 U.S. 598, 611-12 (2000) (internal quotation marks omitted). Moreover, in *Morrison*, the Supreme Court again firmly rejected the proposition that "Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Id.* at 617.

We have no difficulty concluding that § 2250(a) is a proper congressional exercise of the commerce power under *Lopez*. Section 2250(a) only criminalizes a knowing failure to register when the offender is either required to register by reason of a federal law conviction or "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country." These requirements stand in clear contrast to the lack of a jurisdictional predicate in the statutes at issue in *Lopez* and *Morrison* and are clearly intended to provide just such a jurisdictional nexus. According to the statute's explicit terms, a sex offender whose underlying conviction was obtained pursuant to state law and who never crosses state lines, international borders, or the boundaries of Indian country, cannot be criminally liable for failure to comply with SORNA. However, a convicted sex offender who travels interstate may incur criminal liability under the statute. Interstate travel inherently involves use of the channels of interstate commerce and is properly subject to congressional regulation

under the Commerce Clause. Moreover, *Lopez* explicitly acknowledges Congress's power to regulate persons traveling in interstate commerce. *Lopez*, 514 U.S. at 558; *see also United States v. Dixon*, 551 F.3d 578, 583 (7th Cir. 2008), *cert. granted on other grounds sub nom. Carr v. United States*, ___ U.S. ___, 130 S. Ct. 47 (2009). It comes as no surprise, then, that we join every other circuit that has examined the issue in concluding that § 2250(a) is a legitimate exercise of congressional Commerce Clause authority. *See United States v. George*, 579 F.3d 962, 966-67 (9th Cir. 2009); *United States v. Whaley*, 577 F.3d 254, 258 (5th Cir. 2009); *United States v. Gould*, 568 F.3d 459, 470-72 (4th Cir. 2009); *United States v. Ambert*, 561 F.3d 1202, 1210-11 (11th Cir. 2009); *Dixon*, 551 F.3d at 583-84; *United States v. Hinckley*, 550 F.3d 926, 940 (10th Cir. 2008); *United States v. May*, 535 F.3d 912, 921-22 (8th Cir. 2008).

The analysis of the constitutionality of SORNA's underlying registration requirement, § 16913, is more difficult, but ultimately leads to the same result. Appellees contend that § 16913 cannot be justified under the Commerce Clause because its scope is overly broad and may regulate purely intrastate activities by requiring sex offenders to register in the first place and to keep current in their registrations. However, § 16913 does not exist in a vacuum. Sections 2250 and 16913 "were enacted as part of the Adam Walsh Child Protection and Safety Act of 2006, and are clearly complementary: without § 2250, § 16913 lacks federal criminal enforcement, and without § 16913, § 2250 has no substance." *Whaley*, 577 F.3d at 259 (internal citation omitted).

SORNA was preceded by the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994, which conditioned federal funding on states' enactment of sex offender registration laws. *See* 42 U.S.C. § 14071(g)(2). "By the time that SORNA was enacted in 2006, every State and the District of Columbia had enacted a sex offender registration law," *Gould*, 568 F.3d at 464, and SORNA does not penalize failure to register so long as a registrant previously convicted of a state sex offense remains in-state. Thus, with SORNA, Congress's goal was not simply to require sex offenders to register or to penalize the failure to do so, but rather to "establish[ ] a comprehensive national system for the registration of those offenders." 42 U.S.C. § 16901. In other words, Congress wanted to make sure sex offenders could not avoid all registration requirements just by moving to another state.

The Necessary and Proper Clause to the Constitution gives Congress the power to "make all laws which shall be necessary and proper" for its use of the commerce power. U.S. Const., art. 1, § 8, cl. 18. "Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce." *Raich*, 545 U.S. 1, 35 (2005) (Scalia, J., concurring); *see also, e.g.*, *Shreveport R. Co. v. U.S.*, 234 U.S. 342, 353 (1914). Requiring sex offenders to update their registrations due to intrastate changes of address or employment status is a perfectly logical way to help ensure that states will more effectively be able to track sex offenders when they do cross state lines. To the extent that § 16913 regulates solely intrastate activity, its

means "are 'reasonably adapted' to the attainment of a legitimate end under the commerce power," *Raich*, 545 U.S. at 37 (Scalia, J., concurring), and therefore proper. *See Whaley*, 577 F.3d at 260-61; *Ambert*, 561 F.3d at 1212; *United States v. Howell*, 552 F.3d 709, 714-15 (8th Cir. 2009).

Non-delegation

Appellees further contend that, in § 16913, Congress unconstitutionally delegated its legislative authority to the United States Attorney General. They argue that SORNA impermissibly grants the Attorney General congressional legislative authority because § 16913(d) delegates to the Attorney General the authority to specify the applicability of SORNA to sex offenders convicted before July 27, 2006, and § 16917(b) gives the Attorney General the power to prescribe rules to notify sex offenders who are not in custody or awaiting sentencing of their registration requirement.

As a preliminary matter, a circuit split exists about whether § 16913(d) does in fact authorize the Attorney General to determine the "retroactive" applicability of SORNA to sex offenders convicted prior to its enactment, or whether it only allows the Attorney General to determine how, as a practical matter, SORNA-effective with respect to all sex offenders from its enactment-should be implemented with respect to those convicted before SORNA was enacted. *See United States v. Cain*, 583 F.3d 408 (6th Cir. 2009) (former); *Hinckley*, 550 F.3d at 929-35 (latter); *United States v. Hatcher*, 560 F.3d 222, 226-29 (4th Cir. 2009) (former); *May*, 535 F.3d at 915-19 (latter); *United States v. Madera*, 528 F.3d 852, 857-

59 (11th Cir. 2008) (per curiam) (former).[2] Resolution of the issue presented by this circuit split, however, does not alter the outcome of the present cases. As discussed in greater detail below, if we interpret § 16913(d) narrowly, then defendants lack standing to challenge § 16913(d)'s delegation of authority; if, on the other hand, we interpret § 16913(d) broadly,

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[2] Section 16913(d) reads, in its entirety, "[t]he Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section." Subsection (b) provides requirements for initial registration, i.e., it must be done "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement," or "not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment." We do not decide whether § 16913(d) delegates to the Attorney General the authority to determine whether SORNA applies to sex offenders convicted prior to enactment, or whether it merely gives the Attorney General the specific authority to prescribe rules regarding SORNA's application to all, including those convicted of a sex offense prior to enactment, who are unable to initially register according to the terms of subsection (b).

It is possible that the Supreme Court will answer this question for us shortly, as it recently granted certiorari in *Carr v. United States*, ___ U.S. ___, 130 S. Ct. 47 (2009), in order to address whether § 2250 permits the conviction of individuals for failure to register where the underlying offense and travel in interstate commerce both occurred prior to SORNA's enactment, as well as any ex post facto problem that such an application might raise. However, we do not need to know whether § 16913 or the Attorney General's regulations make the registration requirement apply to those convicted of an underlying offense prior to SORNA's enactment in order to conclude that SORNA does not include an improper delegation of legislative authority.

defendants would have standing, but the merits of their arguments would not prevail. In either scenario, defendants' delegation arguments do not alter our conclusion that defendants' indictments should be reinstated.

According to those circuit courts that narrowly interpret the scope of § 16913(d), neither Guzman nor Hall would have standing to challenge § 16913(d)'s delegation of authority. *Hinckley*, 550 F.3d at 939; *May*, 535 F.3d at 920-21. These circuit courts interpret § 16913(d) as delegating authority to the Attorney General only with respect to those sex offenders who were unable to comply with § 16913(b)'s initial registration requirements. *Hinckley*, 550 F.3d at 939; *May*, 535 F.3d at 918-19. According to these courts, § 16913(d) does not commit any authority to the Attorney General with regard to sex offenders who were convicted prior to SORNA's enactment and who *already initially registered* as sex offenders with their respective states; therefore, according to these courts, defendants who have already initially registered as sex offenders lack standing to challenge § 16913(d)'s delegation of authority to the Attorney General. *Hinckley*, 550 F.3d at 939; *May*, 535 F.3d at 920-21. Thus, if we followed the lead of the Eighth and Tenth Circuits and narrowly interpreted the scope of § 16913(d), neither Guzman nor Hall would have standing to challenge § 16913(d)'s delegation of authority because both of them had already initially registered as sex offenders with their respective states before SORNA's enactment. In sum, applying this narrow interpretation of § 16913(d), Guzman and Hall's delegation arguments would not deter us from reinstating their indictments.

Likewise, even if we were to interpret § 16913(d) broadly, i.e., even if we were to interpret § 16913(d) as granting the Attorney General the broad authority to determine whether SORNA should apply to any sex offenders convicted before its enactment, the present defendants' delegation arguments would fail. A delegation is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). In other words, Congress needs to provide the delegated authority's recipient an "intelligible principle" to guide it. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); *see also Mistretta v. United States*, 488 U.S. 361, 372-73 (1989). The Attorney General's authority under SORNA is highly circumscribed. SORNA includes specific provisions delineating what crimes require registration, 42 U.S.C. § 16911; where, when, and how an offender must register, *id.* § 16913; what information is required of registrants, *id.* § 16914; and the elements and penalties for the federal crime of failure to register, 18 U.S.C. § 2250.[3] *See Ambert*, 561 F.3d at 1214. If § 16913(d) gives the Attorney General the power to determine SORNA's "retroactivity," it does so only with respect to the limited class of

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[3] Appellees do not appear to challenge 42 U.S.C. § 16912(b), which directs the Attorney General to "issue guidelines and regulations to interpret and implement" SORNA. This is the broadest grant of authority in the Act. However, in light of the specificity of SORNA's goal to establish a "comprehensive national system for the registration of [sex] offenders," 42 U.S.C. § 16901, and the Act's substantive provisions, consideration of § 16912(b) would not change our analysis. *See, e.g., Mistretta*, 488 U.S. at 372-73.

individuals who were convicted of covered sex offenses prior to SORNA's enactment; the Attorney General cannot do much more than simply determine whether or not SORNA applies to those individuals and how they might comply as a logistical matter. If, on the other hand, § 16913(d) gives the Attorney General the authority only to *implement* SORNA with respect to all sex offenders, whether or not they were convicted pre-enactment, then the scope of that authority is even more circumscribed.[4] *See, e.g.*, Applicability of the Sex Offender Registration and Notification Act, 72 Fed.Reg. 8,894, 8,896 (Feb. 28, 2007) ("Considered facially, SORNA requires all sex offenders who were convicted of sex offenses in its registration categories to register in relevant jurisdictions, with no exception for sex offenders whose convictions predate the enactment of SORNA."). The Supreme Court has upheld much broader delegations than these. *See Mistretta*, 488 U.S. at 372-73.

Non-implementation by New York, Massachusetts, and Virginia

Appellees argue that their indictments warrant dismissal because New York, Massachusetts, and Virginia have not implemented SORNA at the state level. However, as a panel of this Court recently held, SORNA creates a federal duty to register with the relevant existing state registries regardless of state implementation of the specific additional

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[4] As already discussed, at least two circuit courts have held that defendants would not even have standing to challenge this more circumscribed delegation of authority. *See Hinckley*, 550 F.3d at 939; *May*, 535 F.3d at 920-21. Nevertheless, it is worth noting that even a less circumscribed delegation of authority, as discussed above, would survive scrutiny.

requirements of SORNA. *United States v. Hester*, 589 F.3d 86, 92-93 (2d Cir. 2009) (per curiam); *see also United States v. Brown*, 586 F.3d 1342, 1347-49 (11th Cir. 2009); *United States v. George*, 579 F.3d at 965; *United States v. Gould*, 568 F.3d 459, 463-66 (4th Cir. 2009). Furthermore, the Attorney General has the authority both to "issue guidelines and regulations to interpret and implement [SORNA]," 42 U.S.C. § 16912(b), and to "specify the applicability of the requirements of [SORNA] to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction," *id.* § 16913(d). The Attorney General has also issued regulations clarifying that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act."[5] 28 C.F.R. § 72.3; *see also* National Guidelines for Sex Offender Registration and Notification, 73 Fed.Reg. 38,030, 38,046-47 (July 2, 2008).

There is no express condition in the text of SORNA that the applicability of the registration requirement should depend upon state implementation of SORNA's terms. Nor is there any link between a state's obligation to comply with the statute-enforced via the threat of withheld funding-and an individual sex

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[5] The Ninth Circuit recently held that the application of SORNA's registration requirements with respect to juveniles who were adjudicated delinquent due to a sex offense prior to SORNA's enactment violates the Ex Post Facto Clause. *United States v. Juvenile Male*, 581 F.3d 977, 993-94 (2009). We do not need to address that question with respect to Hall or Guzman, as neither contends that he was a juvenile when convicted of his underlying sex offense.

offender's independent duty to register. *See Hester*, 589 F.3d 86, 92-93; *Gould*, 568 F.3d at 463-65. Moreover, even if SORNA is unclear by its own terms, the Attorney General has specified that an offender's obligation to register is not contingent on any jurisdiction's implementation of SORNA. 73 Fed.Reg. at 38,046, 38,063-64. Appellees do not and cannot contend that New York, Massachusetts, or Virginia did not have a functional sex offender registry during the relevant time periods.

Appellees further argue that, if SORNA applies to them in spite of the relevant states' non-implementation of its terms, then to apply it would violate the Ex Post Facto and Due Process Clauses. However, both Hall and Guzman were convicted of traveling interstate and failing to register, and in both of their cases the travel and failure to register occurred after SORNA's enactment and the effective date of the regulations indicating that SORNA applies to all sex offenders. *See* 28 C.F.R. § 72.3. There is, therefore, no ex post facto problem with their convictions. *See Weaver v. Graham*, 450 U.S. 24, 30-31 (1981). Moreover, the states in question all had registries in effect prior to Appellees' travel and failure to register; Appellees had notice of registration requirements and, by registering, could have complied with both federal and state laws. *See Hester*, 589 F.3d 86, 92; *Hinckley*, 550 F.3d at 939.

Commandeering

Although Appellees do not elaborate on appeal with respect to their argument that SORNA commandeers state officials into administering federal law in violation of the Tenth Amendment, *see Printz*

v. United States, 521 U.S. 898, 925-26 (1997), they did make this argument in the district court and on appeal have asked us to consider it by generally reasserting all claims raised in their motions to dismiss. However, as the district court noted with respect to Hall, Appellees have not shown that any of the states involved in their interstate travel have taken any steps to implement SORNA. *Hall*, 577 F.Supp. 2d at 617. Appellees' Tenth Amendment argument therefore necessarily fails.

Conclusion

Appellees' cases are hereby consolidated solely for the purposes of this appeal, and the district court's orders of (1) September 23, 2008, dismissing the indictment in *United States v. Hall*; (2) October 17, 2008, dismissing the superseding indictment in *United States v. Guzman*; and (3) December 4, 2008, denying the government's motion for reconsideration in *United States v. Hall*, are hereby REVERSED, the indictments REINSTATED, and the cases REMANDED to the district court to conduct further proceedings in accordance with this opinion.

No. 17-6086

IN THE

Supreme Court of the United States

HERMAN AVERY GUNDY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

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QUESTION PRESENTED

Whether the Sex Offender Registration and Notification Act's delegation to the Attorney General in 34 U.S.C. § 20913(d) (formerly 42 U.S.C. § 16913(d)) violates the constitutional nondelegation doctrine.

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Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103–322, § 170101, 108 Stat. 2038 (1994) 3, 4, 6
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34 U.S.C. § 20901 ..... *passim*

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S. 1086, 109th Cong. § 104(a)(8) (May 4, 2006) 7

Other Authorities

The Federalist No. 47 (James Madison) (Clinton Rossiter ed., 1961) 18

The Federalist No. 75 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 22

Logan, Wayne A., *The Adam Walsh Act and the Failed Promise of Administrative Federalism*, 78 Geo. Wash. L. Rev. 993 (2010) 6, 11

Madison, James, *Madison's Report on the Virginia Resolutions (1800), in* 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 560 (J. Elliot ed., 1836) 48

Madison, James, *The Report of 1800, in* 14 *The Papers of James Madison* (Robert A. Rutland et al. eds., 1983) 20

McPherson, Lori, *The Sex Offender Registration and Notification Act (SORNA) at 10 Years: History, Implementation, and the Future*, 64 Drake L. Rev. 741 (2016) 3

Sunstein, Cass R., *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000) 28

Tribe, Laurence H., *American Constitutional Law* (3d ed. 2000) 27, 28, 40

U.S. Department of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, *SORNA Implementation Status*, www.smart.gov/sorna-map.htm 12

Wechsler, Herbert, *The Political Safeguards of Federalism*, 54 Colum. L. Rev. 543 (1954) 19

Yung, Corey R., *One of These Laws Is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 Harv. J. Legis. 369 (2009) 37, 38

BRIEF FOR PETITIONER

Petitioner Herman Avery Gundy respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The summary order of the United States Court of Appeals for the Second Circuit, J.A. 13, affirming petitioner's conviction, is reported at 695 Fed. Appx. 639. The district court's decision rejecting petitioner's nondelegation claim, J.A. 89-90, is unreported. A prior decision by the Second Circuit, J.A. 19, reversing the pretrial dismissal of the indictment on grounds not at issue here, is reported at 804 F.3d 140. The district court's decision to dismiss the indictment, J.A. 60, is unreported but can be found at 2013 WL 2247147.

JURISDICTION

The Second Circuit entered its judgment affirming petitioner's conviction on June 22, 2017. Petitioner filed a timely petition for a writ of certiorari on September 20, 2017, which this Court granted, limited to Question 4, on March 5, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, § 1, of the Constitution of the United States provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Relevant portions of the Sex Offender Registration and Notification Act are reproduced in the Appendix to this brief.

INTRODUCTION

The nondelegation doctrine, rooted in Article I, § 1, of the Constitution, prohibits Congress from transferring its legislative powers to another branch of government. This case concerns whether Congress violated that doctrine by giving the Attorney General unguided discretion to criminalize the conduct of hundreds of thousands of individuals.

The Sex Offender Registration and Notification Act ("SORNA" or "the Act") requires that any person convicted of a "sex offense"—including a local crime—register in each jurisdiction where he resides, works, or is a student. 34 U.S.C. §§ 20911(5), 20913(a).[1] SORNA also makes it a federal felony, punishable by up to ten years in prison, for someone who "is required to register under [SORNA]," to "travel[] in interstate or foreign commerce," and thereafter "knowingly fail[] to register or update a registration as required" by SORNA. 18 U.S.C. § 2250(a).

Congress did not decide whether, when, or how SORNA's registration requirements, and its related criminal penalties, apply to the more than 500,000 people convicted of a sex offense before the law's July 27, 2006 enactment. Instead, Congress delegated to the Attorney General the power to decide all issues concerning SORNA's retrospective application to these so-called pre-Act offenders. As a result, "the Act's registration requirements [did] not apply to pre-Act offenders until the Attorney General so specifie[d]." *Reynolds v. United States*, 565 U.S. 432, 445 (2012).

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[1] The Act was originally codified at 42 U.S.C. § 16901 *et seq.* and is now codified at 34 U.S.C. § 20901 *et seq.* This brief cites to the Act as currently codified.

The question in this case, expressly reserved in *Reynolds*, 565 U.S. at 441, is whether this delegation violates the constitutional separation of powers, as embodied in the nondelegation doctrine. It does. The delegation here is far more expansive and unconstrained than any the Court has upheld.

In *United States v. Lopez*, 514 U.S. 549 (1995), the Court recognized a limit on Congress's power under the Commerce Clause because of a realization that the Government's theory knew no bounds. *Id.* at 566-67. The same is true here. If the nondelegation doctrine means anything, it must mean that Congress cannot grant the Attorney General—the nation's top prosecutor—unguided discretion to compel the registration of individuals and to determine the reach of related criminal laws.

STATEMENT OF THE CASE

A. Legal background

1. *Pre-SORNA background.* Sex offender registration schemes originated with, and continue to be operated principally by, state governments acting pursuant to their police powers. Until the 1990s, sex offender registration systems were exclusively the product of state initiatives. *See, e.g.*, Lori McPherson, *The Sex Offender Registration and Notification Act (SORNA) at 10 Years: History, Implementation, and the Future*, 64 Drake L. Rev. 741, 746-49 (2016).

Congress entered the registration picture in 1994, when it enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act ("Wetterling Act"), Pub. L. No. 103–322, § 170101, 108 Stat. 2038 (1994) (codified as amended at 42 U.S.C. § 14071). The statute threatened to withhold federal funds from states if they failed to adopt certain

congressionally prescribed registration requirements within three years. *Id.* § 170101(f).

The Wetterling Act applied only prospectively—that is, only to those convicted of qualifying offenses after the law's implementation. *See* Wetterling Act § 170101(a)(1), 108 Stat. at 2038; Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 61 Fed. Reg. 15110, 15112 (Apr. 4, 1996) ("The [Wetterling] Act does not require states to attempt to identify and impose registration requirements on offenders who were convicted of offenses . . . prior to the establishment of a conforming registration system.").

By 1996, every state had implemented a sex offender registry. *Smith v. Doe*, 538 U.S. 84, 89-90 (2003). Nonetheless, Congress continued to enact laws requiring states to change their registration schemes or lose certain federal funds. Like the Wetterling Act, these laws operated prospectively, usually with an effective date one year in the future.[2]

2. *SORNA's registration requirements.* In 2006, Congress enacted SORNA as part of the Adam Walsh Child Protection and Safety Act. SORNA's declared purpose is "to protect the public" by "establish[ing] a comprehensive national system for the registration" of

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[2] *See, e.g.*, Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345, 1345 (1996) and 62 Fed. Reg. 39009, 39019 (July 21, 1997) (requiring states to release registry information to public for certain sex offenders convicted after program established); Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104–236, § 10(a), 110 Stat. 3093, 3098 (effective one year after enactment); Department of Justice Appropriations Act of 1998, Pub. L. No. 105–119, Tit. I, § 115(c)(1), 111 Stat. 2440, 2467 (additional registration requirements delayed for one year).

"sex offenders and offenders against children." 34 U.S.C. § 20901.

The Act established new federal mechanisms to support state registration schemes and to foster information sharing among jurisdictions. *See, e.g.*, 34 U.S.C. § 20921 (creating National Sex Offender Registry, which compiles state registration data); *id.* § 20925 (requiring development of software to enable jurisdictions to establish uniform registries and Internet sites); *id.* § 20941 (providing federal law enforcement resources to assist states in apprehending missing state sex offenders).

The Act also set new, more onerous baseline registration requirements for state systems. SORNA enlarged the class of offenses that subject a person to registration, 34 U.S.C. § 20911(5)(A), and for the first time mandated that juvenile offenders as young as 14 register, *id.* § 20911(8). The Act imposed more burdensome registration obligations on individuals, compelling them to register in multiple jurisdictions, *id.* § 20913(a); to report periodically in person, *id.* § 20918; and to provide additional information, including school and employment locations, DNA, finger and palm prints, vehicle descriptions, and Internet identifiers, *id.* §§ 20914, 20916.

SORNA also created a three-tier system for classifying sex offenders based on the offense of conviction (rather than based on individualized risk assessments, which many states had previously used). *See* 34 U.S.C. §§ 20911, 20915 (requiring tier I offenders, the lowest tier, to register for 15 years; tier II offenders for 25 years; and tier III offenders for life). SORNA provides no mechanism for offenders to challenge their tier classification.

As with prior federal legislation, Congress required states to comply with SORNA's provisions in order to receive certain federal funds. Congress gave the states until July 2009 to implement the law, subject to two potential one-year extensions by the Attorney General. 34 U.S.C. § 20926(a)-(b). Based on this timetable, SORNA phased out prior federal registry laws, including the Wetterling Act. *See* SORNA § 129, 120 Stat. 590, 600-01 (2006).

3. *SORNA's criminal penalties.* SORNA created—and demanded that states create—substantial criminal penalties for individuals who fail to comply with its registration requirements. First, the Act mandated that states "provide a criminal penalty that includes a maximum term that is greater than 1 year for the failure of a sex offender to comply with" SORNA's requirements. 34 U.S.C. § 20913(e).

Second, the Act made the failure to register under SORNA a federal crime in certain circumstances. The Act states in relevant part that whoever (1) "is required to register under" SORNA; (2) "travels in interstate or foreign commerce"; and (3) "knowingly fails to register or update a registration as required by" SORNA is guilty of a federal crime punishable by up to ten years in prison. 18 U.S.C. § 2250(a).

4. *SORNA's legislative history and delegation to the Attorney General.* Because SORNA placed the bulk of its administrative burden on states, the question of its retroactive application to pre-Act offenders was a "controversial issue with major policy significance and practical ramifications for states." Wayne A. Logan, *The Adam Walsh Act and the Failed Promise of Administrative Federalism*, 78 Geo. Wash. L. Rev. 993, 999-1000 (2010). Legislators estimated that this group

of pre-Act offenders included more than 500,000 people. *See* 151 Cong. Rec. H20,175 (daily ed. Sept. 14, 2005) (statement of Rep. Harris); 151 Cong. Rec. H20,193 (daily ed. Sept. 14, 2005) (statement of Rep. Emanuel).

A House of Representatives bill would have made the law applicable to pre-Act offenders. *See* H.R. 4472, 109th Cong. § 111(3) (as passed by House Mar. 8, 2006) (defining sex offender to include persons convicted "before or after the enactment" of the Act); *id.* § 113(d) (stating Attorney General "shall prescribe rules for the registration of sex offenders convicted before the enactment" of the Act). A Senate bill, however, left the question of the Act's retroactive application to the Attorney General. *See* S. 1086, 109th Cong. § 104(a)(8) (as passed by Senate, May 4, 2006).

Congress ultimately declined to resolve the issue, enacting a final version similar to the Senate bill: "Congress elected not to decide for itself whether the Act's registration requirements—and thus § 2250(a)'s criminal penalties—would apply to persons who had been convicted of qualifying sex offenses before SORNA took effect. Instead, Congress delegated to the Attorney General the authority to decide that question." *Carr v. United States*, 560 U.S. 438, 466 (2010) (Alito, J., dissenting).

The final law states, in relevant part: "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offenders . . . ." 34 U.S.C. § 20913(d).

This grant of authority is entirely permissive: it "does not require [the Attorney General] to act at all." U.S. Br. 23, *Reynolds v. United States*, 565 U.S. 432 (2012) (No. 10-6549). Or "he could . . . wait several years before acting." *Id.* at 24. Section 20913(d) further allows the Attorney General to "change his mind at any given time or over the course of different administrations." *Id.*

The Attorney General was thus given the power to decide what Congress declined to resolve: whether SORNA would apply to pre-Act offenders at all; which pre-Act offenders would be required to register; and how SORNA's various provisions would be applied to these individuals.

5. *The Attorneys General's retroactivity decisions.* When SORNA was first passed, then-Attorney General Alberto R. Gonzales took no action. *Reynolds v. United States*, 565 U.S. 432, 443 (2012). About six months later, he issued an Interim Rule stating that SORNA requires registration of "all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. § 72.3; Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894 (Feb. 28, 2007).[3]

In 2008, Attorney General Michael B. Mukasey promulgated the SMART Guidelines. *See* The

[3] The Attorney General did not comply with the Administrative Procedure Act's (APA's) notice and comment procedures before issuing this rule, instead invoking the APA's "good cause" exception. *See United States v. Brewer*, 766 F.3d 884, 889 (8th Cir. 2014). The circuits "are divided over whether the Attorney General's justifications for extending SORNA to all pre-Act offenders without adhering to the requirements of the APA were sufficient." *Id.* (laying out split).

National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030 (July 2, 2008). These Guidelines stated that SORNA required states to register only some, not all, pre-Act offenders. Specifically, SORNA required registration of pre-Act offenders: (i) then "incarcerated or under [probation or parole] supervision, either for the predicate sex offense or for some other crime"; (ii) "already registered or subject to a pre-existing sex offender registration requirement under the jurisdiction's law"; or (iii) who later "reenter the jurisdiction's justice system because of conviction for some other crime (whether or not a sex offense)." *Id.* at 38046.

In 2011, Attorney General Eric H. Holder, Jr. issued supplemental rules making further changes: SORNA no longer required states to register all pre-Act offenders who reenter the system—only those convicted of a new felony offense. *See* Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630, 1639 (Jan. 11, 2011).

Attorneys General have also taken different positions as to *how* SORNA applies to pre-Act offenders. For example, in the 2008 SMART Guidelines, Attorney General Mukasey addressed SORNA's durational requirements and determined that, as a default, pre-Act offenders received no credit for time previously spent in the community before SORNA was enacted. *See* The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. at 38036. However, states were permitted to adopt a different rule to "reduce[]" the "retroactive application" of SORNA. *See id.* The Attorney General used the following example:

> SORNA § 115 requires registration for 25 years for a [tier II] sex offender . . . . A sex offender who was released from imprisonment for such an offense in 1980 is already more than 25 years out from the time of release. In such cases, a jurisdiction *may* credit the sex offender with the time elapsed . . . and does not have to require the sex offender to register . . . .

Id. at 38047 (emphasis added); *see also id.* at 38036 (stating jurisdictions had "option" to credit prior time, although "SORNA's requirements apply to all sex offenders, regardless of when they were convicted").

In the 2010 Final Rule, Attorney General Holder took the opposite position: he opined that SORNA credited pre-Act offenders with their entire prior period in the community, regardless of what a local jurisdiction might decide. The Attorney General used the same example of a tier II offender convicted in 1980, who was now freed from SORNA's requirements:

> [I]f a person was released from imprisonment in 1980 for a sex offense that places him in tier II, his SORNA registration period based on that offense ended in 2005—whether or not he was ever actually registered for the offense—and he is subject to no present registration requirement based on SORNA . . . .

Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. 81849, 81851 (Dec. 29, 2010).

6. *States' objections and resistance to SORNA.* Following the 2007 Interim Rule, several states submitted comments to the Attorney General objecting to SORNA's retroactivity, expressing

concerns over its fairness to past offenders (especially juveniles) and noting the adverse impact that registering pre-Act offenders would have on state resources. "Almost all [the comments received] objected to the retroactive application" of SORNA. *See* Logan, *supra*, at 1002.

For example, the National Conference of State Legislatures told the Attorney General that his retroactivity decision would infringe upon "state sovereignty over the treatment of sex offenders as laid out in each state's respective sex offender registry provisions." *Id.* As the heads of six New York State agencies stated in a joint letter: "When each state first created its sex offender registry, it made a choice about how the registration requirements would be applied to previously convicted offenders. The decision on retroactive applicability raises substantial practical and policy concerns that are more appropriately addressed by the individual states." *Id.* at 1003 (quoting Letter from Denise O'Donnell et al.).

Other states similarly objected to "the increased burden associated with retroactivity." *Id.* at 1004 n.65 (citing e-mails from officials in Michigan, California, and Idaho).[4]

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[4] States also expressed more global concerns over the Attorney General's proposals. *See, e.g.*, Logan, *supra*, at 1004 (noting that Virginia objected that the "proposed regulations would be extremely cumbersome to implement and cause Virginia to devote significant resources to the collection of information which would be of limited use"); *id.* (quoting the National Conference of State Legislatures' objections that the Attorney General's proposed guidelines are a "one-size-fits all approach" that "compound the burdensome, preemptive scheme of the underlying law they seek to clarify").

As of May 2018, the Attorney General has determined that only 18 states (and four territories) have substantially implemented SORNA. *See* Dep't of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, SORNA Implementation Status, www.smart.gov/sorna-map.htm. Four of the five most populous states—California, Texas, New York, and Illinois—have not implemented the law. *See id.*

7. *Challenges to SORNA's retroactivity and delegation provision.* In the roughly 12 years since it was passed, SORNA has spawned a host of legal challenges. Among other issues, the courts of appeals divided on whether SORNA applied to pre-Act offenders of its own force or only after the Attorney General exercised his authority under Section 20913(d). *See Reynolds*, 565 U.S. at 438-39.

Some judges observed that, if SORNA did not apply to pre-Act offenders of its own force, the statute would raise a serious nondelegation issue. For example, in her concurring opinion in *United States v. Fuller*, Judge Raggi wrote that she "fail[ed] to see what guidance [SORNA] provide[s] to the Attorney General in exercising legislative authority to decide whether or not SORNA's registration requirements should apply to prior offenders at all." 627 F.3d 499, 511 (2d Cir. 2010) (Raggi, J., concurring). This would be especially problematic because it would give the Attorney General, "the very officer charged with executive power to enforce the criminal laws, the legislative power unilaterally to pronounce the scope of a law with criminal consequences." *Id.* at 511-12.

In *Reynolds*, 565 U.S. at 439, the Court nevertheless held that "the textual language" of

SORNA dictated that it did not apply of its own force to pre-Act offenders; instead Congress left the issue to the Attorney General. The Court reserved the question of whether this delegation is unconstitutional. *Id.* at 441. In dissent, Justice Scalia, joined by Justice Ginsburg, wrote that "it is not entirely clear . . . that Congress can constitutionally leave it to the Attorney General to decide—with no statutory standard whatever governing his discretion—whether a criminal statute will or will not apply to certain individuals. That seems . . . sailing close to the wind with regard to the principle that legislative powers are nondelegable . . . ." *Id.* at 450 (Scalia, J., dissenting).

B. Factual and procedural background

1. In 2005, before SORNA was enacted, petitioner Herman Avery Gundy entered an *Alford* plea in Maryland to Sexual Offense in the Second Degree, in violation of Maryland Criminal Law § 3-306, for the sexual assault of a minor. J.A. 25, 60. He was sentenced to 20 years in prison, with ten years suspended, and five years of probation. *Id.* At that time, Maryland had its own sex offender registration system, and petitioner's conviction obligated him to register under Maryland law. *Id.* 40.

2. In November 2010, petitioner completed the custodial portion of this state sentence and was transferred to the custody of the Federal Bureau of Prisons to serve a related federal sentence. J.A. 26. The Bureau of Prisons transferred petitioner from Maryland to a prison in Pennsylvania. *Id.* Then, in July 2012, it transferred him from Pennsylvania to a halfway house in New York for completion of his sentence. *Id.* Petitioner was released from this halfway house on August 27, 2012, and remained in

New York. *Id.* 27. He was arrested in New York in connection with this case in October 2012. *Id.* 62.

3. By indictment dated January 7, 2013, in the United States District Court for the Southern District of New York, the Government charged petitioner with violating SORNA's federal criminal provision, 18 U.S.C. § 2250(a). J.A. 45. The indictment alleged that petitioner: (1) was "an individual required to register" under SORNA based on the 2005 Maryland sex offense, (2) traveled in interstate commerce, and (3) "thereafter resided in New York without registering" as required under SORNA. *Id.*

Petitioner moved to dismiss the indictment. J.A. 3. Because his sex offense conviction predated SORNA, he argued, among other things, that the Act could not constitutionally apply to him: the nondelegation doctrine prohibited Congress from outsourcing to the Attorney General the fundamentally legislative decision about whether SORNA applies to pre-Act offenders. *Id.* 90.

The district court dismissed the indictment on unrelated grounds, J.A. 60, but the Second Circuit reversed and remanded, *id.* 20.

4. On remand, the district court rejected petitioner's nondelegation argument, declaring itself bound by the Second Circuit's decision in *United States v. Guzman*, 591 F.3d 83, 92 (2d Cir. 2010). J.A. 90. In *Guzman*, the Second Circuit acknowledged that "Congress needs to provide the delegated authority's recipient an 'intelligible principle' to guide it." *Id.* 108 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). The Second Circuit nonetheless held that Section 20913(d) satisfied the nondelegation doctrine because it gave the Attorney

General the power to determine SORNA's application "only with respect to the limited class of offenders who were convicted of covered sex offenses prior to SORNA's enactment." J.A. 108-09. The Second Circuit also suggested that the existence of a detailed statutory regime to govern post-Act offenders supplies an intelligible principle for deciding whether SORNA should apply to pre-Act offenders. *See id.* 108.

Petitioner and the Government proceeded to a bench trial on stipulated facts, at which petitioner was found guilty. J.A. 16. The district court sentenced him to time served and five years of supervised release. *Id.*

5. Petitioner renewed his nondelegation argument on appeal. The Second Circuit rejected this argument and affirmed. J.A. 17-18. In a single-sentence footnote, the court stated that the argument was foreclosed by its decision in *Guzman*. *Id.* 18 n.2.

SUMMARY OF ARGUMENT

This case concerns one of the Constitution's basic structural constraints on the exercise of coercive governmental power, in a context where that power impacts individual liberty in the most profound way.

The nondelegation doctrine bars Congress from abdicating its legislative function and transferring lawmaking power to another branch. Yet Section 20913(d) of SORNA grants the Attorney General undirected discretion to decide whether the more than 500,000 people convicted of sex offenses before July 2006 are subject to onerous federal registration requirements and the attendant criminal penalties for failing to register. By permitting the Attorney General to make these decisions, and to define the reach of criminal laws, the statute grants the Attorney General what can only be characterized as "legislative" powers.

The statute is thus unconstitutional under any formulation of the nondelegation doctrine. Under the original understanding of that doctrine, it is unconstitutional because it transfers to the Attorney General the authority to make generally applicable rules of private conduct, backed by criminal sanctions. Under more permissive conceptions of Congress's delegation power, Section 20913(d) is unconstitutional because it transfers rulemaking authority without setting forth a sufficiently intelligible principle—i.e., without doing the "legislative" work. The intelligible principle must include, at minimum, standards or criteria to guide and restrain the exercise of the delegated power.

But Section 20913(d) is standardless. It includes no directives to the Attorney General as to whether he should make any pre-Act offenders register; which offenders should be required to register; or even what he must (or must not) consider in deciding these questions. As the Government itself has stated, the delegation allows the Attorney General to take no action; to wait years before acting; and, if he acts, to simply reverse course at any time. His discretion is plenary. Like the statutes the Court invalidated in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), Section 20913(d) fails to provide the requisite guidance to the Executive.

Moreover, as the Court has recognized, the amount of guidance required depends on the character and importance of the delegated power. Delegations of significant power require more guidance than delegations relating to minor issues. This principle confirms the absence of sufficient guidance here: Section 20913(d) grants the Attorney General

authority to make policy decisions that bear directly on individual liberty (by determining the reach of registration requirements and criminal penalties for half a million people); disturb settled expectations of law (by deciding if SORNA imposes new registration obligations based on conduct that occurred sometimes decades earlier); and infringe states' sovereign interests (by regulating purely intrastate conduct and dictating to states, as a condition of federal funding, how they must regulate and criminalize conduct within their own borders). Yet the statute gives the Attorney General no meaningful guidance as to how to exercise these vast powers. For all of these reasons, the statute is unconstitutional.

ARGUMENT

I. The Constitution prohibits Congress from delegating its legislative powers, particularly in the criminal context.

1. The Constitution establishes a tripartite system of government that separates power among the three federal branches. Article I dictates that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. It prescribes that laws be made according to "a single, finely wrought and exhaustively considered, procedure," including bicameralism and presentment. *INS v. Chadha*, 462 U.S. 919, 951 (1983); *see also Clinton v. City of New York*, 524 U.S. 417, 445 (1998) (invalidating Line Item Veto Act because President cannot change or "effect the repeal of laws, for his own policy reasons, without observing the procedures set out in Article I, § 7").

The nondelegation doctrine protects the constitutional separation of powers and lawmaking

procedure by prohibiting Congress from delegating its legislative powers and thereby circumventing this carefully crafted scheme. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 371-72 (1989); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 405-06 (1928). The doctrine protects individual liberty, promotes democratic accountability, and preserves federalism.

a. *Individual liberty.* The nondelegation doctrine, like the separation of powers more generally, "diffuses power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). The Framers understood that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." *The Federalist No. 47*, at 301 (James Madison) (Clinton Rossiter ed., 1961); *see also Bowsher v. Synar*, 478 U.S. 714, 722 (1986) ("Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty.").

b. *Deliberative lawmaking and democratic accountability.* The nondelegation doctrine also fosters a particular form of lawmaking and democratic accountability. "Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberate lawmaking." *Loving v. United States*, 517 U.S. 748, 757-58 (1996). Both deliberation and responsiveness are key: the Constitution's specific, structured lawmaking process promotes the regularity and stability that the rule of

law requires, while Congress's representative nature ensures broad participation in lawmaking.

Moreover, prohibiting Congress from delegating its lawmaking function ensures that citizens can readily identify the source of laws, thereby preventing government actors from "wield[ing] power without owning up to the consequences." *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring).

c. *States' interests.* Finally, the nondelegation doctrine helps preserve state sovereignty. Within our constitutional framework, states maintain their sovereign interests, in part, through their representatives' participation in the federal legislature, particularly the Senate. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 (1985). "[T]he structural safeguards inherent in the normal operation of the legislative process operate to defend state interests from undue infringement." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 907 (2000) (Stevens, J., dissenting); *see generally* Herbert Wechsler, *The Political Safeguards of Federalism*, 54 Colum. L. Rev. 543 (1954).

2. Because of its focus on protecting individual liberty, the nondelegation doctrine is enforced most rigorously in the criminal context.[5] The Framers

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[5] Several specific constitutional provisions safeguard the separation of powers in the criminal context. While Congress may single out parties to a civil suit, *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1327 (2016), the Bill of Attainder Clause, U.S. Const. art. I, § 9, prevents Congress from singling out persons for criminal punishment. This protection is "an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by

recognized that, with "criminal subjects," Congress should "leave as little as possible to the discretion of those who are to apply and to execute the law." James Madison, *The Report of 1800*, *in* 14 *The Papers of James Madison* 266, 307, 324 (Robert A. Rutland et al. eds., 1983). As a result, the Court has made clear that "defining crimes" is a "legislative" function, *United States v. Evans*, 333 U.S. 483, 486 (1948), and that Congress cannot delegate "the inherently legislative task" of determining what conduct "should be punished as crimes." *United States v. Kozminski*, 487 U.S. 931, 949 (1988); *see also United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) ("It is the legislature . . . which is to define a crime, and ordain its punishment.").

This special prohibition on congressional delegation of criminal lawmaking power is reflected in the Court's void-for-vagueness doctrine. Vague criminal statutes are prohibited both because individuals are entitled to sufficient notice as to what constitutes a crime and to prevent legislatures from "abdicat[ing] their responsibilities for setting the standards of the criminal law." *Smith v. Goguen*, 415 U.S. 566, 574-75 (1974); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (vague laws "impermissibly delegate[] basic policy matters to

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legislature." *United States v. Brown*, 381 U.S. 437, 442 (1965). Similarly, while Congress may impose retroactive civil liability, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994), the Ex Post Facto Clause, U.S. Const. art. I, § 9, circumscribes the ability of Congress to criminalize behavior retrospectively. In this way, the Clause "upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law." *Weaver v. Graham*, 450 U.S. 24, 29 n.10 (1981).

policemen"); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) (invalidating vague criminal statute as delegation to define crimes). "In that sense, the [void-for-vagueness] doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018).

Because the Constitution forbids the legislature from transferring the power to define crimes, the Court has also withheld deference under *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984), for agencies' interpretations of criminal statutes. *Chevron* deference is premised on the theory that statutory ambiguity is an implicit delegation from Congress to the agency to resolve the ambiguity. *Id.* at 844. The Court's refusal to grant *Chevron* deference in the criminal context reflects the Court's repeated admonition that Congress, not the Executive, must specify the terms of criminal laws. *See, e.g., Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014) (rejecting agency interpretation of criminal statute as irrelevant because "criminal laws are for courts, not for the Government, to construe"); *United States v. Apel*, 134 S. Ct. 1144, 1151 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference.").

3. While concerns about the separation of powers reach their apex in the criminal context, they are reduced when considering shared, or non-Article I, powers. "It will not be contended that Congress can delegate . . . powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825). But Congress "may certainly," *id.* at 43, transfer "non-legislative powers which Congress

could exercise" itself, *United States v. Grimaud*, 220 U.S. 506, 517 (1911); *accord Dimaya*, 138 S. Ct. at 1248 (Thomas, J., dissenting) ("Congress does not 'delegate' when it merely authorizes the Executive Branch to exercise a power that it already has.").

Thus, for example, Congress has broad authority to assign to the President matters within the Executive Branch's traditional domain, including matters relating to foreign affairs and the military. *See, e.g., United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319-320 (1936); *Loving v. United States*, 517 U.S. 748, 772-73 (1996). Congress and the Executive have also historically shared the authority to grant patents or to administer other public franchises and public lands. *See, e.g., Oil States Energy Servs., L.L.C. v. Greene's Energy Grp., L.L.C.*, 138 S. Ct. 1365, 1373-74 (2018). Congressional assignments in these contexts do not violate the nondelegation doctrine because they are not delegations of exclusively "legislative" powers.

4. The Court has not "exactly drawn" the line separating "legislative" from executive or judicial powers, *see Wayman*, 23 U.S. (10 Wheat.) at 42-43, but one thing is clear: the power to enact generally applicable, binding rules of private conduct is "legislative." *See Yakus v. United States*, 321 U.S. 414, 424 (1944); *see also The Federalist No. 75*, at 450 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society."). As the Court stated in *Yakus*, "[t]he essentials of the legislative function are the determination of the legislative policy and its . . . promulgation as a defined and binding rule of conduct." 321 U.S. at 424; *see also Mistretta*, 488 U.S.

at 396 (upholding delegation where Congress did not transfer the authority to make rules that "bind or regulate the primary conduct of the public"); *Grimaud*, 220 U.S. at 516 (congressional grant of power to Executive to regulate national forests conferred "administrative functions" rather than "legislative power," because the forestry regulations "do not declare general rules with reference to rights of persons and property, nor do they create or regulate obligations and liabilities").

II. Section 20913(d) of SORNA violates the nondelegation doctrine.

Section 20913(d) violates the Constitution under any formulation of the nondelegation doctrine. First, the delegation is invalid under an originalist understanding of the nondelegation doctrine because the statute transfers to the Attorney General what can only be described as legislative authority. Second, the statute is unconstitutional because it fails to provide a sufficiently intelligible principle to cabin and direct the Attorney General's exercise of the delegated powers. The significance and character of those powers call for substantial, meaningful congressional guidance in the statute, but Section 20913(d) provides the Executive no guidance whatsoever.

A. Section 20913(d) impermissibly delegates quintessentially "legislative" powers.

1. Section 20913(d) of SORNA grants the Attorney General quintessentially legislative powers: it allows him to prescribe rules, backed by criminal sanctions, governing the conduct of roughly half a million private individuals, including petitioner.

This delegation grants the Attorney General authority to decide if individuals like petitioner must submit to government registration and to set the terms and duration of that registration. It affects the substantive liberty interests of these individuals in the most profound way.

SORNA also empowers the Attorney General to determine the reach of both federal and state criminal laws. First, by allowing the Attorney General to decide which, if any, pre-Act offenders are "required to register" under SORNA, Congress has delegated to the Attorney General the authority to define, and determine the scope of, the elements of SORNA's new federal criminal offense. *See* 18 U.S.C. § 2250(a) (first element of offense is being "required to register under the Sex Offender Registration and Notification Act" and third element is "knowingly fail[ing] to register or update a registration as required by [SORNA]"); *see also Carr v. United States*, 560 U.S. 438, 446-47 (2010) (holding that first element is triggered only by a requirement to register under SORNA, not by the underlying sex offense conviction). The Attorney General is thus empowered to decide unilaterally whether a pre-Act offender's conduct—failing to register under SORNA—can be a federal crime.

Second, the Act effectively allows the Attorney General to determine the scope of new state crimes. As a condition of federal funding, SORNA commands states to adopt felony penalties for offenders who fail to register as required under the Act. *See* 34 U.S.C. § 20913(e). Because Section 20913(d) gives the Attorney General the authority to decide which pre-Act state offenders, if any, must register under SORNA, the statute effectively empowers the

Attorney General to determine the reach of these new state criminal laws.

The exercise of these broad powers over individuals is lawmaking in the most basic sense. Accordingly, the statute confers on the Attorney General powers that can only be described as "legislative."

2. Under an originalist interpretation of the Constitution, the legislative nature of these delegated powers ends the inquiry and requires this Court to invalidate the delegation. *See, e.g., Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring) ("[T]he original understanding of the federal legislative power . . . require[s] that the Federal Government create generally applicable rules of private conduct only through the constitutionally prescribed legislative process."); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825) ("It will not be contended that Congress can delegate . . . powers which are strictly and exclusively legislative. . . . [Those powers] must be entirely regulated by the legislature itself."); *Field v. Clark*, 143 U.S. 649, 692 (1892) ("That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.").

B. SORNA's delegation to the Attorney General fails the intelligible principle test.

In addition to violating originalist constitutional principles governing delegations of power, Section 20913(d) fails the Court's prevailing "intelligible principle" test.

1. To state an intelligible principle, a statute must provide sufficiently clear guidance on fundamental policy questions.

a. While affirming that Congress cannot delegate its legislative powers, the Court has recognized that "separation-of-powers principle[s] . . . do not prevent Congress from obtaining the assistance of its coordinate Branches." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). The Court's modern jurisprudence has been "driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Id.*

The Court developed the "intelligible principle" test to evaluate such congressional delegations of power. Under this test, if "Congress shall lay down by legislative act an intelligible principle to which the person or body [to whom power is delegated] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

When Congress lays down a sufficiently clear guiding principle, the Court has construed the powers delegated not to be "legislative," even if they involve some degree of discretion, because Congress itself has made all of the fundamental policy decisions—i.e., it has done the "legislative" work. *See J.W. Hampton, Jr., & Co.*, 276 U.S. at 407. As the Court explained in *J.W. Hampton, Jr. & Co.*, when Congress delegates pursuant to an "intelligible principle" it "is not an

exact statement" to claim that the Executive is exercising "legislative power" because such "power has already been exercised legislatively by the body vested with that power." *Id.*; *accord Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932) ("[T]he legislative power of Congress cannot be delegated . . . . But Congress may declare its will, and, after fixing a primary standard, devolve . . . the 'power to fill up the details' . . . .").

b. In addition to being clear enough to guide the Executive, this intelligible principle must enable courts to determine whether the delegate has acted within the bounds of the delegated authority and in accordance with Congress's expressed will. *See, e.g.*, *Yakus v. United States*, 321 U.S. 414, 423, 425 (1944) (courts must be able to see "in an appropriate proceeding" that there is a "substantial basis" for the executive action and that the "will of Congress has been obeyed"); *Indus. Union Dep't AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring) (intelligible principle requirement "ensures that courts . . . reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards").

The intelligible principle requirement thus preserves "both sets of constitutional checks—judicial and political—on the exercise of coercive authority in a 'government of laws.'" Laurence H. Tribe, *American Constitutional Law* 985 (3d ed. 2000). It permits a court to police delegations to ensure the delegate does not exceed Congress's grant of authority and follows Congress's will. And by requiring Congress to provide adequate guidance in the first instance, the intelligible

principle test ensures that Congress itself makes the critical legislative policy decisions.

c. Under the intelligible principle test, the amount of required congressional guidance depends on the "extent and character" of the power conferred. *See J.W. Hampton, Jr., & Co.*, 276 U.S. at 406; *see also Whitman*, 531 U.S. at 475 ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."). Congress itself must regulate certain "important subjects," but may more freely delegate to the executive in areas of "less interest." *Wayman*, 23 U.S. (10 Wheat.) at 43. Thus, while Congress "must provide substantial guidance on setting air standards that affect the entire national economy," far less guidance is necessary when the Executive determines relatively minor matters, like the definition of "country elevators." *Whitman*, 531 U.S. at 475.

Congress must speak with particular clarity when it confers powers that "touch[] constitutionally sensitive areas." Tribe, *supra*, at 987. "[A]ction . . . in areas of doubtful constitutionality[] requires careful and purposeful consideration by those responsible for enacting and implementing our laws." *Greene v. McElroy*, 360 U.S. 474, 507 (1959); *see also Kent v. Dulles*, 357 U.S. 116, 129 (1958) ("If . . . 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress."); Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 317 (2000) (noting that the nondelegation doctrine's "most convincing claim" is "that certain highly sensitive decisions should be made by Congress").

When transferring powers that touch upon these areas, Congress must provide sufficiently clear

directives to show that it deliberated and made the required "legislative judgment." *United States v. Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring) ("The area of permissible indefiniteness [of a delegation] narrows, however, when the regulation invokes criminal sanctions and potentially affects fundamental rights"); *see also Bilski v. Kappos*, 561 U.S. 593, 649 (2010) (Stevens, J., concurring) ("[A]t the 'fringes of congressional power,' 'more is required of legislatures than a vague delegation to be filled in later[.]'") (quoting *Barenblatt v. United States*, 360 U.S. 109, 139-40 (1959) (Black, J., dissenting)).

This principle is of course manifest in the requirement that Congress—not the Executive—decide the scope of criminal laws, as discussed above in Section I.2.

It is also reflected in the need for Congress to speak with specificity regarding whether a law should apply retroactively—another sensitive, significant decision that requires legislative deliberation and accountability. Retroactivity "is not favored in the law," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), because retroactive statutes "sweep away settled expectations" "without individualized consideration," and impede rule-of-law values. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). The Court thus looks for Congress to clearly state that a law is retroactive, or clearly authorize the Executive to order retroactivity. *See, e.g.*, *Bowen*, 488 U.S. at 207-15 (invaliding retroactive rule because delegation did not clearly require retroactivity). This ensures that "Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf*, 511 U.S. at 268.

Congress must also provide clear guidance for laws that impinge upon state sovereignty or otherwise disturb the traditional federal-state balance of power. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (requiring plain statement so that court can be "absolutely certain" Congress intended to interfere with state selection of judges). This is a corollary to the general presumption against federal preemption in areas traditionally regulated by the states. *See, e.g., California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989).

2. Given the character and significance of the power conferred by Section 20913(d), and the absence of guidance, this delegation is unconstitutional.

In light of the need for Congress to provide more "substantial guidance" when delegating in important areas, *Whitman*, 531 U.S. at 475, Section 20913(d) is unconstitutional. The delegation here gives the Attorney General the power to define the reach of both federal and state criminal laws. It empowers the Attorney General to decide whether the Act applies retroactively, allowing him to impose requirements that upset individuals' settled expectations and, in some cases, disturb final court judgments issued under pre-SORNA laws. It also purports to allow the Attorney General to regulate the purely intrastate conduct of pre-Act offenders, infringing a traditional area of state sovereignty.

In other words, the delegation involves exactly the sort of significant and constitutionally sensitive decisions that require careful legislative deliberation and especially clear legislative guidance. But this statute provides the Attorney General with no guidance with respect to pre-Act offenders.

a. Section 20913(d) states in relevant part: "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter [SORNA] to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offenders . . . ." 34 U.S.C. § 20913(d).

SORNA does not tell an Attorney General whether, when, or how she should expand the statute to cover pre-Act offenders. Nor does the statute identify any criteria an Attorney General should (or should not) consider in making her decisions. Should she require the registration of all offenders even if their convictions are 15, 20, or 30 years old? Should she consider factors other than the age of conviction in making this decision? Should she consider the logistical and financial burdens on states that must register these offenders? The statute is silent.

The Government itself has acknowledged the astounding breadth of this delegation. In *Reynolds*, the Government explained that, pursuant to Section 20913(d), an Attorney General "could do nothing at all" with respect to applying SORNA to pre-Act offenders. U.S. Br. 2, *Reynolds v. United States*, 565 U.S. 432 (2012) (No. 10-6549). He could wait several years before acting. *Id.* Even once he took some position, he "could change his mind at any given time or over the course of different administrations." *Id.* And the Attorney General could require pre-Act offenders to "comply with some but not all of the registration requirements." *Id.*; *see also* Tr. of Oral Arg. 31, *Reynolds v. United States*, 565 U.S. 432 (2012) (No. 10-6549) (Government describing delegation as "quite broad" and "plenary").

In *Reynolds*, the Court accepted this understanding of the statute. It held that Section 20913(d) must be read "as conferring the authority to *apply*" SORNA to pre-Act offenders and that the "registration requirements do not apply until the Attorney General so specifies." *Reynolds*, 565 U.S. at 440, 445. The Court also acknowledged that the statute contemplates the possibility of "different federal registration treatment of different categories of pre-Act offenders." *Id.* at 440-41.

Nor are these descriptions of the unconstrained nature of this delegation merely hypothetical. The various actions of Attorneys General under Section 20913(d) reveal the sort of unguided policy making—and policy reversals—that are the hallmark of the exercise of unfettered discretion.

In 2006, the Attorney General took no position as to which pre-Act offenders, if any, were required to register under SORNA, meaning that none were. Then, in February 2007, he issued the Interim Rule stating that *all* pre-Act offenders were required to register under SORNA. Applicability of the Sex Offender Registration and Notification Act, 72 Fed. 8849, 8897 (Feb. 28, 2007). But in 2008, a different Attorney General reversed course—stating in the SMART Guidelines that SORNA required states to register only *some* pre-Act offenders. *See* The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38046 (July 2, 2008). Then, in 2011, the law changed again: another Attorney General issued supplemental guidelines altering which pre-Act offenders SORNA required to register. *See* Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630, 1635 (Jan. 11, 2011).

The Attorneys General's policies as to *how* SORNA applies to pre-Act offenders have also changed. SORNA sets durational registration requirements for post-Act offenders, based on the offense of conviction. *See* 34 U.S.C. § 20915 (setting terms between 15 years and life). One question for many pre-Act offenders is how these durational requirements apply to them. For instance, if someone has been released since 1980, and would only be required to register for 25 years under SORNA, does SORNA require her registration for another 25 years starting from its 2006 enactment—or has she already completed her term?

The lack of statutory guidance on this question is apparent from the Attorneys General's changing policies. In 2008, the Attorney General decided that the default was to give no credit for the time offenders previously resided in the community. *See* The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38036, 38047 (July 2, 2008). But then, in 2010, this policy changed: the Attorney General stated he would fully credit prior time in the community, meaning that if a person had already been in the community for the relevant period set forth in Section 20915, SORNA did not require her to register at all. *See* Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. 81849, 81851 (Dec. 21, 2010).

The point is not that the Attorneys General's various pronouncements regarding pre-Act offenders represent good or bad policy. Nor is it that these repeated policy reversals are necessarily arbitrary. The point is that the Constitution requires Congress—not the Attorney General—to make these sorts of fundamental legislative choices and for Congress's

choices to be reflected in the guidance it provides in any delegation. That the Attorneys General have taken such different positions underscores that Section 20913(d) provides no guidance at all.

b. The lack of guidance attending this delegation makes Section 20913(d) akin to the statutes the Court invalidated in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Both cases involved laws backed by criminal sanctions, and that fact, coupled with the overall significance of the delegated authority, weighed in the Court's holdings that Congress had not sufficiently constrained Executive power in its delegations. *See Fahey v. Mallonee*, 332 U.S. 245, 249 (1947) (distinguishing *Panama Refining* and *Schechter Poultry* because they "dealt with delegation of a power to make federal crimes of acts that never had been such before").

In *Panama Refining*, 293 U.S. at 406, the Court struck down a statutory provision "authoriz[ing] [the President] to prohibit the transportation in interstate and foreign commerce of petroleum" products produced in excess of state production quotas, so-called "hot oil." The Court noted that whether oil could be transported in interstate commerce was "obviously [a question] of legislative policy." *Id.* at 415. It therefore looked to the statute to see whether Congress had properly "set up a standard for the President's action; [or] . . . required any finding by the President in the exercise of the authority to enact the prohibition." *Id.*

The statute did not do so. It did not state "whether or in what circumstances or under what conditions" the President was to ban hot oil, nor provide any

criteria to govern his decision. *Panama Refining*, 293 U.S. at 415. The statute instead endowed the President with "unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit," unguided by any "standard or rule." *Id.* at 415, 418. Thus, "[i]nstead of performing its lawmaking function," Congress had "transfer[red] that function to the President." *Id.* at 430.

Similarly, in *Schechter Poultry*, 295 U.S. at 529, the Court struck down a statute authorizing the President to adopt a code of industrial conduct that fostered "fair competition." The Court held that "[i]n view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes . . . is virtually unfettered." *Id.* at 541-42. It invalidated Congress's attempt to "abdicate or transfer to others the essential legislative functions with which it is vested." *Id.* at 529.

As in those cases, Section 20913(d) delegates power to the Executive with no standards to guide him. It does not require the Attorney General to make any factual findings before acting. It gives him the power to lay down registration requirements for pre-Act offenders, or not, as he may see fit.

c. The dearth of guidance in Section 20913(d) stands in marked contrast to statutes where the Court has upheld congressional delegations to the Executive in the criminal lawmaking context.

In *Touby v. United States*, 500 U.S. 160, 168-69 (1991), for example, the Court ruled that Congress had provided sufficient guidance in permitting the Attorney General to temporarily schedule, and thereby criminalize the possession or distribution of,

new drugs under the Controlled Substances Act (CSA). Before exercising this power, Congress required the Attorney General to find that scheduling a new drug was "necessary to avoid an imminent hazard to the public safety." *Id.* at 163 (citing 21 U.S.C. § 811(h)). In making that determination, Congress further required the Attorney General to consider three factors: the drug's "history and current patterns of abuse"; "[t]he scope, duration and significance of abuse"; and "[w]hat, if any, risk there is to the public health." *Id.* at 166 (citing 21 U.S.C. §§ 811(c)(4)-(6), 811(h)(3)). Congress also made clear that the Attorney General needed to make a panoply of other specific findings. *Id.* at 166-67 (citing § 202(b), 21 U.S.C. § 812(b)).

The Court determined that even if "greater congressional specificity [regarding a delegation] is required in the criminal context," the detailed directives in the CSA satisfied these requirements because they "meaningfully constrain[ed]" the Attorney General's discretion. *Touby*, 500 U.S. at 166. Indeed, the statute at issue in *Touby* resembles some of the earliest delegations approved by the Court, which conditioned executive action on the making of specific factual findings. *See, e.g.*, *Field v. Clark*, 143 U.S. 649, 693 (1892) (holding President was not "making laws" where delegation required him to act if he found a particular fact).

Those delegations are completely unlike Section 20913(d), which does not require the Attorney General to make any factual findings before applying SORNA to pre-Act offenders. It does not tell him the factors to consider in his decision. It does not constrain his discretion at all.

d. The fact that SORNA grants the Attorney General unguided discretion to decide the scope of criminal laws is one important reason for the Court to strike down the delegation. But it is not the only reason. SORNA's delegation touches on other constitutionally sensitive areas, permitting the Attorney General to impose new legal obligations based on past conduct and to intrude on traditional areas of state sovereignty. This underscores the need for substantial and especially clear legislative guidance to accompany the delegation. Because that guidance is utterly lacking, these are additional reasons for the Court to hold Section 20913(d) unconstitutional.

1. *Retroactivity.* The delegation in Section 20913(d) allows the Attorney General to apply SORNA's registration requirements to persons based on conduct that occurred before—sometimes decades before—the statute's enactment. It empowers the Attorney General, not Congress, to decide whether and how the Act applies to these individuals. Assuming Congress can delegate to the Attorney General the power to impose these more burdensome federal registration requirements on pre-Act offenders, Congress must provide particularly clear guidance as to whether and under what conditions the requirements should be imposed retroactively.[6] Yet

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[6] This Court has not yet determined whether SORNA violates the ex post facto prohibition, *see Carr v. United States*, 560 U.S. 438, 442 (2010), though it upheld Alaska's registration system against an ex post facto challenge, *Smith v. Doe*, 538 U.S. 84, 105-06 (2003). SORNA is significantly more onerous than the registration system sanctioned in *Smith*. *See, e.g.*, Corey Rayburn Yung, *One of These Laws Is Not Like the Others: Why the Federal*

the delegation here provides no "express terms," *Bowen*, 488 U.S. at 209—indeed, no terms at all—to guide the Attorney General's retroactivity decision.

2. *State sovereignty*. The delegation here also demands unambiguous congressional guidance because it allows the Attorney General to make rules that infringe state sovereign interests.

Sex Offender Registration and Notification Act Raises New Constitutional Questions, 46 Harv. J. Legis. 369, 386 (2009) (noting that the "differences between SORNA and the Alaska statute are so significant" that "§ 2250(a) should be struck down on the grounds reviewed in *Smith*").

At a minimum, action in this area of "doubtful constitutionality" demands purposeful consideration by Congress itself. *See Greene v. McElroy*, 360 U.S. 474, 507 (1959). Several state supreme courts have distinguished *Smith* to hold that retroactive application of their state registration and notification laws violate state (or federal) ex post facto prohibitions. *See Commonwealth v. Muniz*, 164 A.3d 1189, 1218, 1222-23 (Pa. 2017) (Pennsylvania registration scheme violates both state and federal constitutions); *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009) (same regarding Maine scheme); *Doe v. State*, 111 A.3d 1077, 1100 (N.H. 2015) (New Hampshire scheme violates state constitution); *Starkey v. Okla. Dep't of Corrections*, 305 P.3d 1004, 1030 (Okla. 2013) (same regarding Oklahoma scheme); *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 62 A.3d 123, 143 (Md. 2013) (same regarding Maryland scheme); *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009) (same regarding Indiana scheme); *Doe v. State*, 189 P.3d 999, 1019 (Ala. 2008) (application of Alaskan registration scheme to pre-Act offenders violates state constitution, despite ruling in *Smith*). The Sixth Circuit has held that retroactive application of Michigan's registration law violates the federal ex post facto prohibition. *Does v. Snyder*, 834 F.3d 696, 705-06 (6th Cir. 2016); *cf. Millard v. Rankin*, 265 F. Supp. 3d 1211, 1232-34 (D. Colo. 2017) (enforcement of Colorado's registration law against those with old convictions violates Eighth and Fourteenth Amendments).

SORNA contemplates that states will retain primary responsibility for registering and monitoring state sex offenders. *See Carr v. United States*, 560 U.S. 438, 452 (2010). The retroactive application of SORNA's more expansive registration requirements posed significant logistical burdens on states. *See supra* at 11-12. It also ran contrary to states' policy choices about how to regulate affairs within their own borders. *See id.*

Even if states decline to implement SORNA, the Attorney General has stated that SORNA requires pre-Act state sex offenders to register as required by the Act. *See* 28 C.F.R. § 72.3; Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8895 (Feb. 28, 2007) ("SORNA directly imposes registration obligations on sex offenders as a matter of federal law . . . ."); *id.* ("In contrast to SORNA's provision of a three-year grace period for jurisdictions to implement its requirements, SORNA's direct federal law registration requirements for sex offenders are not subject to any deferral . . . ."); Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. 81849, 81850 (Dec. 29, 2010) (same); The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38031 (July 2, 2008) (same).

In other words, even if a state has not implemented SORNA and even if state registration laws (or court judgments) do not require a state sex offender to register, SORNA imposes a freestanding federal registration requirement on these individuals. *See, e.g., United States v. Paul*, 718 Fed. Appx. 360, 363 (6th Cir. 2017) (upholding a Section 2250 conviction of a pre-Act state sex offender whose state judgment exempted him from state registration

because "SORNA imposes a distinct federal duty that [the defendant's] Tennessee judgment could not and did not release"); *United States v. Pendleton*, 636 F.3d 78, 83, 85-86 (3d Cir. 2011) (upholding a Section 2250 conviction based on defendant's failure to update registration when he moved to Delaware, even though he was not required to register under Delaware law).

This is a significant intrusion on state sovereign interests and the traditional authority of states to regulate conduct within their own borders. Even assuming Congress has the power to encroach upon state interests in this fashion,[7] these are the sorts of policies that must be debated and made in Congress—where the states are represented and can participate more meaningfully in policymaking. Congress may not delegate constitutionally delicate policymaking power to another entity absent clear, meaningful guidance indicating that Congress itself has deliberated on the

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[7] Congress has no general police power to regulate purely intrastate, non-economic activity, including intrastate criminal activity. *See, e.g., Bond v. United States*, 134 S. Ct. 2077, 2086 (2014); *United States v. Kebodeaux*, 570 U.S. 387, 402-03 (2013) (Roberts, C.J., concurring). Thus, Congress likely lacks authority to require state sex offenders to register under SORNA, as Section 20913 requires. Unlike SORNA's federal criminal provision (18 U.S.C. § 2250), the registration provision contains no reference to interstate commerce or other basis for the exercise of federal power. If Congress itself lacks the power to require state sex offenders to register under SORNA, this would invalidate the delegation to the Attorney General in Section 20913(d). *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("Congress cannot grant to an officer under its control what it does not possess."); Tribe, *supra*, at 980-81 ("Because Congress can give away only what is its to give, the most obvious limits on legislative delegation are those on all legislation: the constitutional prohibition on federal legislative action [] not affirmatively authorized by the Constitution . . . .").

costs and benefits of different policies, and considered the effects on the states. Section 20913(d) lacks such guidance.

3. Section 20913(d) is unconstitutional under any formulation of the intelligible principle test.

a. Even if the Court puts aside the particular subject matter of this delegation, Section 20913(d) would still be unconstitutional. Under the most permissive formulation of the intelligible principle test, the Court has required that Congress provide clear guidance on fundamental policy questions. To do this, Congress must specify, at a minimum, its legislative objective and criteria or standards to guide and cabin the exercise of the delegated power, or otherwise "prescribe[] the method of achieving that objective." *Yakus v. United States*, 321 U.S. 414, 423 (1944).

For example, in *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001), a section of the Clean Air Act directed the Environmental Protection Agency to promulgate ambient air quality standards "the attainment and maintenance of which . . . are requisite to protect the public health." *Id.* at 465 (quoting 42 U.S.C. § 7409(a)). The statute directed the EPA to use "technical 'criteria' documents," reflecting the latest scientific knowledge, "to identify the maximum airborne concentration of a pollutant that the public health can tolerate, decrease the concentration" for an "adequate" margin of safety, and set the standard there. *Id.* at 465, 473.

The Court held that the terms of that delegation—both the specific policy objective and the clearly articulated standards to guide the decision-maker—

adequately constrained the EPA's discretion. *Id.* at 465-68. The act defined a sufficiently specific goal (air quality standards "requisite" to "protect the public health" with an "adequate margin of safety"). *Id.* And the statute told the EPA what to consider, and what not to consider, to achieve that goal. *Id.* The statute was specific enough for the Court to rule that the delegation gave the EPA no authority to consider cost in setting air quality standards. *Id.* at 465-72.

b. Here, in contrast, SORNA contains no goal specifically relating to the delegation; no criteria to constrain the Attorney General's exercise of the delegated power; and no standards by which a court can evaluate any executive action. Section 20913(d) instead grants the Attorney General plenary power to determine SORNA's applicability to pre-Act offenders—to require them to register, or not, as she sees fit, and to change her policy for any reason and at any time.

One way to see the difference between Section 20913(d) and valid delegations, like that upheld in *Whitman*, is to consider the absence of standards for a court to apply in reviewing the Attorney General's actions. In *Whitman*, the Court could look to the statute to determine if the EPA was complying with Congress's will and to see which actions were within the terms of the delegation. *See Whitman*, 531 U.S. at 465-75; *see also Yakus*, 321 U.S. at 423, 425 (explaining that intelligible principle allows reviewing courts to determine whether there is a "substantial basis" for executive action and whether the "will of Congress has been obeyed").

A court is unable to conduct a similar analysis with respect to Section 20913(d). Because the

provision states no policy objective and lists no criteria or standards for the agent to consider, it is impossible to determine whether the Attorneys General's various actions—doing nothing, requiring all pre-Act offenders to register, requiring only certain pre-Act offenders to register, and so on—comply with congressional will. This proves the absence of an intelligible principle guiding this delegation.

4. The courts of appeals have not persuasively identified an intelligible principle in Section 20913(d).

a. Nor have the courts of appeals considering this delegation persuasively identified any principle limiting the Attorney General's discretion. As a preliminary matter, the Second Circuit downplayed the need for legislative guidance by claiming that Congress gave the Attorney General "only" the authority to "determine whether or not SORNA applies" to pre-Act offenders and, if so, to decide "how they might comply" with the statute. J.A. 109. Because pre-Act offenders constitute "a limited class of individuals," the Second Circuit concluded, the authority Section 20913(d) confers is "highly circumscribed." J.A. 108.

This analysis is flawed. First, "[a] delegation of authority to determine the potential criminal exposure of half a million people cannot be deemed narrow." *United States v. Fuller*, 627 F.3d 499, 511 (2d Cir. 2010) (Raggi, J., concurring); *see also id.* at 505 & n.2 (majority opinion) (describing "sole authority to determine SORNA's criminal reach" as an "expansive and profound power" and "awesome authority"). Second, the Second Circuit's approach confuses the need for meaningful statutory guidance with the

question of how many people a delegation affects. Congress cannot cede its lawmaking power to another branch just because that power concerns a discrete group. If that were the case, Congress could assign to the Attorney General the power to issue binding rules of conduct for the entire population of Wyoming, because the roughly half-million people who live there constitute only a "limited class of individuals."

Similarly, under the Second Circuit's logic, Congress would have been free to make the delegation in *Panama Refining*, because the rules concerned only the trafficking of "hot oil." Yet the Court there held that, even though "the act to be performed [by the Executive was] definite and single," the delegation was still invalid because "the necessity, time, and occasion of the performance ha[d] been left in the end to the discretion of the delegate." *Schechter Poultry*, 295 U.S. at 551 (Cardozo, J., concurring) (describing *Panama Refining*).

b. The question is not whether a class of more than 500,000 people is "limited," but whether Congress provided a sufficiently intelligible principle to ensure that the Attorney General is executing Congress's will, not her own. On that question, the Second Circuit and other courts of appeals have suggested that the mere existence of a detailed statutory regime to govern post-Act offenders supplies an intelligible principle for deciding whether SORNA should apply to pre-Act offenders. *See* J.A. 108; *see also United States v. Cooper*, 750 F.3d 263, 272 (3d Cir. 2014); *United States v. Ambert*, 561 F.3d 1202, 1214 (11th Cir. 2009).

This is wrong because the Attorney General was given plenary authority to decide whether SORNA's requirements even apply to pre-Act offenders. And if

the Attorney General decides to compel pre-Act offenders to register, there is no statutory directive that she apply the same terms to pre-Act offenders as to post-Act offenders (or even apply the same terms to all pre-Act offenders). *See Reynolds v. United States*, 565 U.S. 432, 440 (2012) (delegation appears to permit "different federal registration treatment of different categories of pre-Act offenders"). Accordingly, rather than cabining the Attorney General's discretion, Congress's explicit guidance for post-Act offenders starkly exposes the Attorney General's wholly unchecked power to devise a pre-Act regime and prosecute anyone who violates it. *See United States v. Nichols*, 784 F.3d 666, 675 (10th Cir. 2014) (Gorsuch, J., dissenting from denial of reh'g en banc).

c. Courts of appeals besides the Second Circuit have also sought an intelligible principle in SORNA's prefatory declaration of purpose, which states that the Act seeks to establish a "comprehensive national system for the registration of [sex] offenders" in order "to protect the public," 34 U.S.C. § 20901. *See, e.g.*, *United States v. Nichols*, 775 F.3d 1225, 1231-32 (10th Cir. 2014), *rev'd on other grounds*, 136 S. Ct. 1113 (2016); *Cooper*, 750 F.3d at 271-72; *United States v. Goodwin*, 717 F.3d 511, 516-17 (7th Cir. 2013); *Ambert*, 561 F.3d at 1213-14.

According to these courts, this declaration of purpose shows that Congress meant to "provide the broadest possible protection to the public" and that the Attorney General was therefore instructed to require the registration of pre-Act offenders "to the extent that he determines it would contribute to the protection of the public and the comprehensiveness of a national sex offender registry." *Ambert*, 561 F.3d at 1214. This reasoning does not withstand scrutiny.

i. First, the Court has held that a general declaration of statutory purpose, unmoored from the specific powers being delegated, is not sufficient to state an intelligible principle. In *Panama Refining*, for example, the Court rejected the argument that vague statements of statutory purpose, unconnected to the particular legislative delegation at issue, were sufficient. The statute in *Panama Refining*, like SORNA, had an introductory statement expounding the general purposes of the legislation. *Panama Refining*, 203 U.S. at 416-17. However, the Court ruled that this was not sufficient to state an intelligible principle: "[T]his broad outline is simply an introduction of the act, leaving the legislative policy as to particular subjects to be declared and defined, if at all, by the subsequent sections." *Id.* at 417-18.

SORNA's general statement of purpose is likewise located in the Act's preface; it is not tied to—and does not refer to—the specific question of how the Attorney General should treat pre-Act offenders. *See* 34 U.S.C. § 20901.

Moreover, if Congress had made a particular policy choice with respect to pre-Act offenders—for example, if it wanted SORNA to apply to all pre-Act offenders—it easily could have said so. SORNA itself contains other provisions that make specific and clear delegations to the Attorney General. *See, e.g.*, 34 U.S.C. § 20916(a) ("The Attorney General . . . shall require that each sex offender provide . . . those Internet identifiers the sex offender uses or will use of any type that the Attorney General determines to be appropriate under that Act."). Thus, Congress knew how to direct the Attorney General when it wanted to. Congress's failure to provide any guidance regarding pre-Act offenders suggests that Congress simply

declined to make the hard policy choices about those offenders, and instead passed them to the Attorney General.

ii. Even if a freestanding general statement of purpose could be enough in some circumstances to provide an intelligible principle, SORNA's statement of purpose does not do so here.

First, the phrase "comprehensive national system," 34 U.S.C. § 20901, likely referenced SORNA's holistic approach to the administration and enforcement of registration requirements, not some unstated desire to extend the statute to cover some or all pre-Act offenders. Through its various provisions, SORNA established a new federal system to facilitate the enforcement of jurisdictions' registration schemes and the sharing of registration information. *See, e.g.*, *id.* § 20921 (creating the National Sex Offender Registry compiling state data); *id.* § 20925 (commanding the Attorney General, in consultation with states, to develop software to enable jurisdictions to establish uniform registries and Internet sites); *id.* § 20941 (providing federal law enforcement resources to assist states in locating and apprehending missing state sex offenders). These provisions comprise the "comprehensive national system" contemplated by Congress; it is not clear how Congress felt about the registration of pre-Act offenders merely because it sought to establish a more comprehensive overall system for future registration.

This Court has also repeatedly and consistently rejected the contention that SORNA's general, overall purpose necessarily means that Congress intended the statute to cover as many offenders as possible in every situation (or otherwise controls the meaning of later

specific provisions). *See Nichols*, 136 S. Ct. at 1118-19 (rejecting Government's argument that SORNA's purpose means it must be interpreted to cover offenders who move abroad); *Reynolds*, 565 U.S. at 442 (rejecting Government's argument that SORNA's purpose means the statute must be construed to cover pre-Act offenders of its own force); *Carr v. United States*, 560 U.S. 438, 443, 454-57 (2010) (rejecting Government's argument that SORNA's purpose requires construing its criminal provision to cover offenders who traveled interstate before the Act's effective date). These decisions affirm that SORNA's general declaration of purpose does not control the interpretation of its particular statutory provisions. In the same way, it does not provide a discernable restriction on the Attorney General's power.

Congress's goal of "protect[ing] the public," 34 U.S.C. § 20901, is also not enough to provide an intelligible principle. After all, every criminal statute is designed to protect the public in some way. If that ubiquitous purpose were enough to provide an intelligible principle, Congress could simply transfer to the Attorney General the authority to decide the coverage of every criminal statute. The Founders rejected such a notion. As James Madison explained: "If nothing more were required, in exercising a legislative trust, than a general conveyance of authority—without laying down any precise rules by which the authority conveyed should be carried into effect—it would follow that the whole power of legislation might be transferred by the legislature from itself . . . ." James Madison, *Madison's Report on the Virginia Resolutions (1800), in* 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 560 (J. Elliot ed., 1836).

Finally, even if Congress's wish to protect people via a "comprehensive national system" encompassed some unexpressed desire to register a large number of pre-Act offenders, it would still leave unanswered the key policy question: how "comprehensive" is comprehensive enough?[8] And at what cost? Congress certainly did not want *all* sex offenders to have to register indefinitely, as the fixed, finite registration periods for post-Act offenders demonstrate. *See* 34 U.S.C. § 20915. But Congress did not offer any guidance as to how the Attorney General should balance this potential desire for expansive coverage against other important policy concerns, such as the burden retroactivity imposes on states.

As the Court recognized when it construed the Comprehensive Criminal Control Act of 1984, "no legislation pursues its purposes at all costs": "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective *is the very essence of legislative choice*—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (first emphasis added).

SORNA is replete with examples of compromises with respect to the registration of post-Act offenders, including the exemption of certain offenders and

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[8] For instance, to be "comprehensive," does SORNA require a tier II offender released in 1980 to register for another 25 years after SORNA's 2006 enactment, as one Attorney General decided? Or is SORNA still "comprehensive" if that offender is freed from SORNA's registration requirements altogether, as a different Attorney General later decided? That there is no answer shows that the statute's general declaration of purpose does not suffice as an "intelligible principle."

limited registration periods for some. The existence of these compromises shows that Congress did not intend SORNA's registration requirements to apply to every sex offender "always and in every particular without exception or at any cost." *See Nichols*, 784 F.3d at 675 (Gorsuch, J., dissenting from denial of reh'g en banc) (collecting examples). Yet the statute delegates the weighing of the various values at stake—the "very essence of legislative choice"—without any guidance.

* * *

The power to decide if more than half a million individuals are subject to government registration, on penalty of prison, is an immense one. The Constitution vests that power exclusively in Congress. But in Section 20913(d) of SORNA, Congress improperly transferred this legislative power to the Attorney General without telling him how, or even whether, to exercise it. The nondelegation doctrine thus requires the Court to invalidate this statute. Doing so will reaffirm basic separation-of-powers principles, thereby protecting liberty, preserving democratic accountability, and vindicating the rule of law.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

United States Code Title 18
Crimes and Criminal Procedure
Part I. Crimes
Chapter 109B. Sex Offender and Crimes Against Children Registry

18 U.S.C. § 2250. Failure to register

Effective: February 8, 2016

(a) In general.--Whoever--

(1) is required to register under the Sex Offender Registration and Notification Act;

(2) (A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

(b) International travel reporting violations.-- Whoever--

(1) is required to register under the Sex Offender Registration and Notification Act (42 U.S.C. 16901 et seq.);

(2) knowingly fails to provide information required by the Sex Offender Registration and Notification Act relating to intended travel in foreign commerce; and

(3) engages or attempts to engage in the intended travel in foreign commerce;

shall be fined under this title, imprisoned not more than 10 years, or both.

(c) Affirmative defense.–In a prosecution for a violation under subsection (a) or (b), it is an affirmative defense that–

(1) uncontrollable circumstances prevented the individual from complying;

(2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and

(3) the individual complied as soon as such circumstances ceased to exist.

(d) Crime of violence.–

(1) In general.–An individual described in subsection (a) or (b) who commits a crime of violence under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States shall be imprisoned for not less than 5 years and not more than 30 years.

(2) Additional punishment.–The punishment provided in paragraph (1) shall be in addition and consecutive to the punishment provided for the violation described in subsection (a) or (b).

Title 34. Crime Control and Law Enforcement
Subtitle II. Protection of Children and Other Persons
Chapter 209. Child Protection and Safety
Subchapter I. Sex Offender Registration and Notification

Effective: September 1, 2017

* * *

34 U.S.C. § 20901. Declaration of purpose

In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this chapter establishes a comprehensive national system for the registration of those offenders . . . .

* * *

34 U.S.C. § 20911. Relevant definitions, including Amie Zyla expansion of sex offender definition and expanded inclusion of child predators

In this subchapter the following definitions apply:

(1) Sex offender:

The term "sex offender" means an individual who was convicted of a sex offense.

(2) Tier I sex offender

The term "tier I sex offender" means a sex offender other than a tier II or tier III sex offender.

(3) Tier II sex offender

The term "tier II sex offender" means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and--

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

(i) sex trafficking (as described in section 1591 of Title 18);

(ii) coercion and enticement (as described in section 2422(b) of Title 18);

(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a)) of Title 18;

(iv) abusive sexual contact (as described in section 2244 of Title 18);

(B) involves--

(i) use of a minor in a sexual performance;

(ii) solicitation of a minor to practice prostitution; or

(iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a tier I sex offender.

(4) Tier III sex offender

The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and--

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or

(ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a tier II sex offender.

(5) Amie Zyla expansion of sex offense definition

(A) Generally

Except as limited by subparagraph (B) or (C), the term " sex offense" means–

(i) a criminal offense that has an element involving a sexual act or sexual contact with another;

(ii) a criminal offense that is a specified offense against a minor;

(iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of Title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of Title 18;

(iv) a military offense specified by the Secretary of Defense under section

115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951); or

(v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

(B) Foreign convictions

A foreign conviction is not a sex offense for the purposes of this subchapter if it was not obtained with sufficient safeguards for fundamental fairness and due process for the accused under guidelines or regulations established under section 20912 of this title.

(C) Offenses involving consensual sexual conduct

An offense involving consensual sexual conduct is not a sex offense for the purposes of this subchapter if the victim was an adult, unless the adult was under the custodial authority of the offender at the time of the offense, or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.

(6) Criminal offense

The term "criminal offense" means a State, local, tribal, foreign, or military offense (to the extent specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note)) or other criminal offense.

(7) Expansion of definition of "specified offense against a minor" to include all offenses by child predators

The term "specified offense against a minor" means an offense against a minor that involves any of the following:

(A) An offense (unless committed by a parent or guardian) involving kidnapping.

(B) An offense (unless committed by a parent or guardian) involving false imprisonment.

(C) Solicitation to engage in sexual conduct.

(D) Use in a sexual performance.

(E) Solicitation to practice prostitution.

(F) Video voyeurism as described in section 1801 of Title 18.

(G) Possession, production, or distribution of child pornography.

(H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.

(I) Any conduct that by its nature is a sex offense against a minor.

(8) Convicted as including certain juvenile adjudications

The term "convicted" or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated

sexual abuse (as described in section 2241 of Title 18), or was an attempt or conspiracy to commit such an offense.

(9) Sex offender registry

The term "sex offender registry" means a registry of sex offenders, and a notification program, maintained by a jurisdiction.

(10) Jurisdiction

The term "jurisdiction" means any of the following:

(A) A State.

(B) The District of Columbia.

(C) The Commonwealth of Puerto Rico.

(D) Guam.

(E) American Samoa.

(F) The Northern Mariana Islands.

(G) The United States Virgin Islands.

(H) To the extent provided and subject to the requirements of section 20929 of this title, a federally recognized Indian tribe.

(11) Student

The term "student" means an individual who enrolls in or attends an educational institution, including (whether public or private) a secondary school, trade or professional school, and institution of higher education.

(12) Employee

The term "employee" includes an individual who is self-employed or works for any other entity, whether compensated or not.

(13) Resides

The term "resides" means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives.

(14) Minor

The term "minor" means an individual who has not attained the age of 18 years.

* * *

34 U.S.C. § 20913. Registry requirements for sex offenders

(a) In general

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration

The sex offender shall initially register--

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) Initial registration of sex offenders unable to comply with subsection (b)

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

(e) State penalty for failure to comply

Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

* * *

34 U.S.C. § 20914. Information required in registration

(a) Provided by the offender

The sex offender shall provide the following information to the appropriate official for inclusion in the sex offender registry:

(1) The name of the sex offender (including any alias used by the individual).

(2) The Social Security number of the sex offender.

(3) The address of each residence at which the sex offender resides or will reside.

(4) The name and address of any place where the sex offender is an employee or will be an employee.

(5) The name and address of any place where the sex offender is a student or will be a student.

(6) The license plate number and a description of any vehicle owned or operated by the sex offender.

(7) Information relating to intended travel of the sex offender outside the United States, including any anticipated dates and places of departure, arrival, or return, carrier and flight numbers for air travel, destination country and address or other contact information therein, means and purpose of travel, and any other itinerary or other travel-related information required by the Attorney General.

(8) Any other information required by the Attorney General.

(b) Provided by the jurisdiction

The jurisdiction in which the sex offender registers shall ensure that the following information is included in the registry for that sex offender:

(1) A physical description of the sex offender.

(2) The text of the provision of law defining the criminal offense for which the sex offender is registered.

(3) The criminal history of the sex offender, including the date of all arrests and convictions; the status of parole, probation, or supervised release; registration status; and the existence of any outstanding arrest warrants for the sex offender.

(4) A current photograph of the sex offender.

(5) A set of fingerprints and palm prints of the sex offender.

(6) A DNA sample of the sex offender.

(7) A photocopy of a valid driver's license or identification card issued to the sex offender by a jurisdiction.

(8) Any other information required by the Attorney General.

(c) Time and manner

A sex offender shall provide and update information required under subsection (a), including information relating to intended travel outside the United States required under paragraph (7) of that subsection, in conformity with any time and manner requirements prescribed by the Attorney General.

34 U.S.C. § 20915. Duration of registration requirement

(a) Full registration period

A sex offender shall keep the registration current for the full registration period (excluding any time the sex offender is in custody or civilly committed) unless the offender is allowed a reduction under subsection (b). The full registration period is–

(1) 15 years, if the offender is a tier I sex offender;

(2) 25 years, if the offender is a tier II sex offender; and

(3) the life of the offender, if the offender is a tier III sex offender.

(b) Reduced period for clean record

(1) Clean record

The full registration period shall be reduced as described in paragraph (3) for a sex offender who maintains a clean record for the period described in paragraph (2) by–

(A) not being convicted of any offense for which imprisonment for more than 1 year may be imposed;

(B) not being convicted of any sex offense;

(C) successfully completing any periods of supervised release, probation, and parole; and

(D) successfully completing of an appropriate sex offender treatment program certified by a jurisdiction or by the Attorney General.

(2) Period

In the case of--

(A) a tier I sex offender, the period during which the clean record shall be maintained is 10 years; and

(B) a tier III sex offender adjudicated delinquent for the offense which required registration in a sex registry under this subchapter, the period during which the clean record shall be maintained is 25 years.

(3) Reduction

In the case of--

(A) a tier I sex offender, the reduction is 5 years;

(B) a tier III sex offender adjudicated delinquent, the reduction is from life to that period for which the clean record under paragraph (2) is maintained.

* * *

34 U.S.C. § 20916. Direction to the Attorney General

(a) Requirement that sex offenders provide certain Internet related information to sex offender registries

The Attorney General, using the authority provided in section 114(a)(7) of the Sex Offender Registration and Notification Act, shall require that each sex offender provide to the sex offender registry those Internet identifiers the sex offender uses or will use of any type that the Attorney General determines to be appropriate under that Act. These records of Internet

identifiers shall be subject to the Privacy Act (5 U.S.C. 552a) to the same extent as the other records in the National Sex Offender Registry.

(b) Timeliness of reporting of information

The Attorney General, using the authority provided in section 112(b) of the Sex Offender Registration and Notification Act, shall specify the time and manner for keeping current information required to be provided under this section.

(c) Nondisclosure to general public

The Attorney General, using the authority provided in section 118(b)(4) of the Sex Offender Registration and Notification Act, shall exempt from disclosure all information provided by a sex offender under subsection (a).

(d) Notice to sex offenders of new requirements

The Attorney General shall ensure that procedures are in place to notify each sex offender of changes in requirements that apply to that sex offender as a result of the implementation of this section.

(e) Definitions

(1) Of "social networking website"

As used in this Act, the term "social networking website"–

(A) means an Internet website–

(i) that allows users, through the creation of web pages or profiles or by other means, to provide information about themselves that is available to the public or to other users; and

(ii) that offers a mechanism for communication with other users where such users are likely to include a substantial number of minors; and

(iii) whose primary purpose is to facilitate online social interactions; and

(B) includes any contractors or agents used by the website to act on behalf of the website in carrying out the purposes of this Act.

(2) Of "Internet identifiers"

As used in this Act, the term "Internet identifiers" means electronic mail addresses and other designations used for self-identification or routing in Internet communication or posting.

(3) Other terms

A term defined for the purposes of the Sex Offender Registration and Notification Act has the same meaning in this Act.

* * *

34 U.S.C. § 20918. Periodic in person verification

A sex offender shall appear in person, allow the jurisdiction to take a current photograph, and verify the information in each registry in which that offender is required to be registered not less frequently than–

(1) each year, if the offender is a tier I sex offender;

(2) every 6 months, if the offender is a tier II sex offender; and

(3) every 3 months, if the offender is a tier III sex offender.

* * *

34 U.S.C. § 20921. National Sex Offender Registry

(a) Internet

The Attorney General shall maintain a national database at the Federal Bureau of Investigation for each sex offender and any other person required to register in a jurisdiction's sex offender registry. The database shall be known as the National Sex Offender Registry.

(b) Electronic forwarding

The Attorney General shall ensure (through the National Sex Offender Registry or otherwise) that updated information about a sex offender is immediately transmitted by electronic forwarding to all relevant jurisdictions.

* * *

34 U.S.C. § 20925. Development and availability of registry management and website software

(a) Duty to develop and support

The Attorney General shall, in consultation with the jurisdictions, develop and support software to enable jurisdictions to establish and operate uniform sex offender registries and Internet sites.

(b) Criteria

The software should facilitate–

(1) immediate exchange of information among jurisdictions;

(2) public access over the Internet to appropriate information, including the number of registered sex offenders in each jurisdiction on a current basis;

(3) full compliance with the requirements of this subchapter; and

(4) communication of information to community notification program participants as required under section 20923 of this title.

(c) Deadline

The Attorney General shall make the first complete edition of this software available to jurisdictions within 2 years of July 27, 2006.

* * *

34 U.S.C. § 20926. Period for implementation by jurisdictions

(a) Deadline

Each jurisdiction shall implement this subchapter before the later of--
(1) 3 years after July 27, 2006; and
(2) 1 year after the date on which the software described in section 20925 of this title is available.

(b) Extensions

The Attorney General may authorize up to two 1-year extensions of the deadline.

* * *

34 U.S.C. § 20927. Failure of jurisdiction to comply

(a) In general

For any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this subchapter shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3750 et seq.).

* * *

34 U.S.C. § 20941. Federal assistance with respect to violations of registration requirements

(a) In general

The Attorney General shall use the resources of Federal law enforcement, including the United States Marshals Service, to assist jurisdictions in locating and apprehending sex offenders who violate sex offender registration requirements. For the purposes of section 566(e)(1)(B) of Title 28, a sex offender who violates a sex offender registration requirement shall be deemed a fugitive.

(b) Authorization of appropriations

There are authorized to be appropriated such sums as may be necessary for fiscal years 2007 through 2009 to implement this section.

* * *

No. 17-6086

In the Supreme Court of the United States

HERMAN AVERY GUNDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the Sex Offender Registration and Notification Act's delegation of authority to the Attorney General to issue regulations under 34 U.S.C. 20913(d) violates the nondelegation doctrine.

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Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, U.S. Dep't of Justice, *SORNA State and Territory Implementation Progress Check* (April 5, 2018), https://www.smart.gov/pdfs/SORNA-progress-check.pdf. 42

Office of the Law Revision Counsel, U.S. House of Representatives, *Editorial Reclassification: Title 34, United States Code*, http://uscode.house.gov/editorialreclassification/t34/index.html (last visited Aug. 2, 2018) 4

In the Supreme Court of the United States

No. 17-6086

HERMAN AVERY GUNDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 13-18) is not published in the Federal Reporter but is reprinted at 695 Fed. Appx. 639. A previous opinion of the court of appeals (J.A. 19-37) is reported at 804 F.3d 140. The relevant opinions and orders of the district court (J.A. 46-88) are not published in the Federal Supplement but are available at 2013 WL 4838845 and 2013 WL 2247147.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2017. The petition for a writ of certiorari was filed on September 20, 2017. The petition was granted on March 5, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-18a.

STATEMENT

In 2004, petitioner gave cocaine to an 11-year-old girl and raped her, for which he was convicted of a sexual offense under Maryland law. J.A. 25-26, 60. In 2012, after petitioner was released from prison, he traveled from Pennsylvania to New York but did not register as a sex offender in New York (or anywhere else). J.A. 15. Following a bench trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of failing to register as a sex offender after traveling in interstate commerce, in violation of 18 U.S.C. 2250(a). J.A. 16. Petitioner was sentenced to time served and five years of supervised release. *Ibid.* The court of appeals affirmed. J.A. 13-18.

1. This Court has observed that "[s]ex offenders are a serious threat in this Nation," largely because their victims "are most often juveniles" and because sex offenders "are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune* v. *Lile*, 536 U.S. 24, 32-33 (2002) (plurality opinion); see *Smith* v. *Doe*, 538 U.S. 84, 103 (2003) (noting "grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class"). Seeking to address those concerns, Congress has repeatedly enacted legislation to encourage and assist States in tracking sex offenders' addresses and "inform[ing] the public" about them "for its own safety." *Smith*, 538 U.S. at 99.

a. In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act), Pub. L. No. 103-322, § 170101, 108 Stat. 2038 (42 U.S.C. 14071 *et seq.*). The Wetterling Act encouraged States to adopt sex-offender registration laws that met certain minimum standards, by making the adoption of such laws a condition of receiving certain federal funding. *Smith*, 538 U.S. at 89-90. By 1996, every State and the District of Columbia had enacted a sex-offender-registration law. *Id.* at 90.

In 1996, Congress bolstered the minimum federal standards by adding a mandatory community-notification provision to the Wetterling Act. Megan's Law, Pub. L. No. 104-145, § 2, 110 Stat. 1345 (42 U.S.C. 14071(e)). Congress also strengthened the national effort to ensure sex-offender registration by directing the FBI to create a national sex-offender database; requiring lifetime registration for certain offenders; and making the failure of certain persons to register a federal crime, subject to penalties including imprisonment. Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, § 2, 110 Stat. 3093 (42 U.S.C. 14072).

b. Despite those efforts, Congress grew concerned about "loopholes and deficiencies" in existing registration and notification statutes, which resulted in an estimated 100,000 sex offenders becoming "missing" or "lost." H.R. Rep. No. 218, 109th Cong., 1st Sess. Pt. 1, at 20, 26 (2005). In 2006, to address those concerns, it

enacted the Sex Offender Registration and Notification Act (SORNA), Pub. L. No. 109-248, Tit. I, 120 Stat. 590 (34 U.S.C. 20901 *et seq.*).[1]

i. Congress enacted SORNA to make "more uniform and effective" the existing "patchwork" of federal and state sex-offender registration systems. *Reynolds* v. *United States*, 565 U.S. 432, 435 (2012). SORNA's express "purpose" is to "protect the public from sex offenders and offenders against children" by "establish[ing] a comprehensive national system for the registration of those offenders." 34 U.S.C. 20901. To that end, SORNA "repeal[ed] several earlier federal laws that also (but less effectively) sought uniformity," and in their place it established new "comprehensive registration-system standards" and made certain "federal funding contingent on States' bringing their systems into compliance with those standards." *Reynolds*, 565 U.S. at 435. Congress authorized the Attorney General to adopt regulations implementing SORNA generally, 34 U.S.C. 20912(b), and to "determine[]" whether a particular jurisdiction receiving federal funding has "fail[ed] * * * to substantially implement" SORNA's requirements, 34 U.S.C. 20927(a) and (d).

SORNA also imposed requirements directly on "both state and federal sex offenders to register with relevant

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[1] Effective September 1, 2017, after the court of appeals issued its decision, SORNA's provisions previously codified at 42 U.S.C. 16901 *et seq.* were recodified as 34 U.S.C. 20901 *et seq.*; the statutory text was not changed. Office of the Law Revision Counsel, U.S. House of Representatives, *Editorial Reclassification: Title 34, United States Code*, http://uscode.house.gov/editorialreclassification/t34/index.html. For consistency, this brief refers throughout to the current, recodified provisions.

jurisdictions (and to keep registration information current)," backed by new criminal sanctions. *Reynolds*, 565 U.S. at 435; see 34 U.S.C. 20913(a)-(c); 18 U.S.C. 2250(a). Section 20913 provides that every "sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 34 U.S.C. 20913(a). A "sex offender" means "an individual who was convicted of" any one of various enumerated "sex offense[s]," including (*inter alia*) various sex crimes involving minors. 34 U.S.C. 20911(1); see 34 U.S.C. 20911(5)-(7). That "broad[]" definition of sex offender "reflects [Congress's] purpose" of creating a "comprehensive national system for the registration of sex offenders." *Reynolds*, 565 U.S. at 442 (brackets, citation, and internal quotation marks omitted).

Section 20913 establishes deadlines by which sex offenders must register and update their registration. 34 U.S.C. 20913(b) and (c). A sex offender "shall initially register * * * before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement." 34 U.S.C. 20913(b)(1). "[I]f the sex offender is not sentenced to a term of imprisonment," then he "shall initially register * * * not later than 3 business days after being sentenced for that offense." 34 U.S.C. 20913(b)(2). Thereafter, "[a] sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction" where the offender resides, is an employee, or is a student, and shall "inform that jurisdiction of all changes in the information required for that offender in the sex offender registry." 34 U.S.C. 20913(c).

To enforce those registration requirements, Congress "creat[ed] federal criminal sanctions applicable to those who violate" them. *Reynolds*, 565 U.S. at 435; 18 U.S.C. 2250(a). Section 2250(a) provides that a person who "is required to register under [SORNA]" based on a state conviction for a sex offense, who "travels in interstate or foreign commerce," and who then "knowingly fails to register or update a registration as required by [SORNA] shall be fined under this title or imprisoned not more than 10 years, or both." 18 U.S.C. 2250(a)(1), (2)(B), and (3). "For a defendant to violate [Section 2250(a)], * * * the statute's three elements must be satisfied in sequence," *i.e.*, the offender must first "become[] subject to SORNA's registration requirements," he "must then travel in interstate commerce," and he must "thereafter fail to register." *Carr* v. *United States*, 560 U.S. 438, 446 (2010) (citation and internal quotation marks omitted).[2]

ii. One issue of particular concern to Congress was registration of offenders who had committed covered sex offenses before SORNA's enactment—tens of thousands of whom were believed to be "missing from the system" in existing databases. *Reynolds*, 565 U.S. at 443; see *id.* at 442 (SORNA's "history * * * reveals that many of its supporters placed considerable importance upon the registration of pre-Act offenders"). Consistent with that concern and the "basic statutory purpose" of creating a "comprehensive national system for the registration of sex offenders," this Court has observed that, "in general, [SORNA's] criminal provisions apply to any

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[2] The requirement to travel in interstate or foreign commerce does not apply to offenders subject to SORNA based on a conviction under federal, District of Columbia, tribal, or territorial law. See 18 U.S.C. 2250(a)(2)(A).

pre-Act offender required to register under the Act who later travels interstate and fails to register." *Id.* at 442 (brackets and citation omitted).

Congress also recognized, however, that the mechanics of applying SORNA's "new registration requirements to pre-Act offenders" presented "what Congress may well have thought were practical problems." *Reynolds*, 565 U.S. at 440; see *id.* at 441-443. One concern was how SORNA's registration deadlines would apply to pre-Act offenders "who [we]re unable to comply with" them. 34 U.S.C. 20913(d). For offenders who had completed their prison sentences before SORNA's enactment, Section 20913(b)'s registration deadline already would have passed; that could have created "uncertainties" about when they needed to register. *Reynolds*, 565 U.S. at 442. In addition, SORNA's goal of "mak[ing] more uniform a patchwork of pre-existing state [registration] systems" required changing some States' registration rules, including "newly registering or reregistering 'a large number' of pre-Act offenders." *Id.* at 440.

Given those practical concerns, in Section 20913(d) Congress directed "the Department of Justice, charged with responsibility for implementation, to examine these" and other "pre-Act offender problems and to apply the new registration requirements accordingly." *Reynolds*, 565 U.S. at 441. Section 20913(d) is captioned "Initial registration of sex offenders unable to comply with" Section 20913(b), which sets SORNA's initial-registration deadlines. 34 U.S.C. 20913(d). It states that "[t]he Attorney General shall have the authority to specify the applicability of the requirements of [SORNA] to sex offenders convicted before [SORNA's] enactment" in 2006 "or its implementation in a particular jurisdiction." *Ibid.* Section 20913(d) further authorizes the Attorney General

"to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with [Section 20913(b)]." *Ibid.*

On February 28, 2007, pursuant to Section 20913(d), the Attorney General issued an interim rule, effective on that date, specifying that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 72 Fed. Reg. 8897 (28 C.F.R. 72.3 (2008)). The interim rule also provided two examples illustrating how SORNA's registration requirements would apply to such pre-Act offenders. *Ibid.* In 2010, the Attorney General promulgated a final regulation that "finaliz[ed] [the] interim rule," with "minor changes" to clarify one of the interim rule's illustrative examples in order "to avoid any arguable inconsistency with [this] Court's holding in *Carr*." 75 Fed. Reg. 81,849, 81,850, 81,853 (Dec. 29, 2010). The regulations' operative text making the registration requirement applicable to all pre-Act offenders has not changed.

iii. In addition to those regulations, in 2008 the Attorney General issued guidelines intended to "provide guidance and assistance to the states and other jurisdictions in incorporating the SORNA requirements into their sex offender registration and notification programs." 73 Fed. Reg. 38,030 (July 2, 2008) (Guidelines). The Guidelines reaffirmed SORNA's application to all sex offenders, and they provided guidance on how jurisdictions should address timing and other logistical issues in registering various categories of pre-Act offenders. *Id.* at 38,035-38,036, 38,046, 38,063-38,064.

The Guidelines also "identifie[d] * * * the minimum required for SORNA compliance" by States and other

jurisdictions, but they emphasized that SORNA "generally constitutes a set of *minimum* national standards and sets a floor, not a ceiling, for jurisdictions' programs," and "[j]urisdictions are free" to impose broader or additional requirements. 73 Fed. Reg. at 38,046-38,047. For example, the Guidelines explained that, because "[t]he required registration period [under SORNA] begins to run upon release from custody," a jurisdiction may "credit a sex offender with a pre-SORNA conviction with the time elapsed from his release," but a jurisdiction may instead choose to go beyond SORNA's requirements and not credit that time. *Id.* at 38,036, 38,046-38,047, 38,068; see 75 Fed. Reg. at 81,851. In 2011, the Attorney General issued supplemental guidelines reiterating that understanding. 76 Fed. Reg. 1630, 1636, 1639 (Jan. 11, 2011).

2. a. In 1994, petitioner pleaded guilty in the United States District Court for the Eastern District of Pennsylvania to one count of conspiracy to distribute cocaine base, in violation of 21 U.S.C. 846. J.A. 60. In 1996, he was sentenced to five years of imprisonment, to be followed by five years of supervised release. *Ibid.* Jurisdiction over petitioner was later transferred to the District of Maryland. *Ibid.*

In 2004, while serving his supervised-release term, petitioner gave cocaine to an 11-year-old girl and raped her. See J.A. 25-26; D. Ct. Doc. 16-2, at 7-12 (Mar. 22, 2013). In 2005, he entered a nolo contendere plea in Maryland state court and was convicted of sexual offense in the second degree. J.A. 25, 60. The court sentenced him to 20 years of imprisonment (with ten years suspended), to be followed by five years of probation, and ordered petitioner to register as a sex offender. *Ibid.*; C.A. App. A67, A70.

Petitioner's Maryland state-court conviction violated a condition of his federal supervised release. J.A. 26. In 2006, he pleaded guilty to the supervised-release violation. *Ibid.* The federal court revoked petitioner's supervised release and ordered him to serve 24 months of imprisonment, to be served consecutively to his Maryland state-court sentence. *Ibid.*

b. In November 2010, petitioner completed the custodial portion of his Maryland sentence. J.A. 26. He was transferred to federal custody to serve his federal revocation term, and he ultimately was transferred to a federal correctional facility in Pennsylvania. *Ibid.*; see D. Ct. Doc. 16, ¶ 9 (Mar. 22, 2013); D. Ct. Doc. 34, at 5 & n.3 (May 31, 2013).

In March 2012, while serving his federal revocation term, petitioner sought and received permission to serve the remaining portion of that term in a halfway house. J.A. 26; see C.A. App. A220. On July 17, 2012, after receiving a furlough for travel, petitioner traveled unescorted by commercial bus from the correctional facility in Pennsylvania to a halfway house in New York City. J.A. 15, 26; see C.A. App. A124-A126. On August 27, 2012, petitioner was released from the halfway house to a private residence in the Bronx. J.A. 15. Petitioner did not register as a sex offender either in Maryland or in New York, as required by state law. *Ibid.*

3. a. A grand jury in the Southern District of New York returned an indictment charging petitioner with one count of failing to register as a sex offender, in violation of 18 U.S.C. 2250(a), based on his failure to register after traveling from Pennsylvania to New York in 2012. J.A. 45. The district court dismissed the indict-

ment, reasoning that petitioner was not required to register at the time he traveled interstate, J.A. 60-88, but the court of appeals reversed and remanded, J.A. 29-37.

Petitioner proceeded to a bench trial on stipulated facts, and the district court found petitioner guilty of violating Section 2250. J.A. 14-15. It rejected his contention that Congress impermissibly delegated legislative power when it authorized the Attorney General to specify the application of SORNA's registration requirements to pre-SORNA offenders. J.A. 90.

b. The court of appeals affirmed. J.A. 14-18. It rejected petitioner's nondelegation challenge to SORNA based on its earlier decision in *United States* v. *Guzman*, 591 F.3d 83, 91-92 (2d Cir.), cert. denied, 561 U.S. 1019 (2010). J.A. 18 n.2. In *Guzman*, the court of appeals had held that, assuming Section 20913(d) authorizes the Attorney General to determine the applicability of SORNA to pre-SORNA offenders, it does not violate the nondelegation principle under this Court's precedent.[3] 591 F.3d at 91; see *id.* at 91-93. *Guzman* explained that "[a] delegation is 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" *Id.* at 92-93 (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)). The court held that SORNA satisfies those requirements. *Id.* at 93. It reasoned that "[t]he Attorney General's authority under

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[3] As *Guzman* observed, lower courts were then divided on whether Section 20913(d) conferred that authority, or instead gave the Attorney General only discretion regarding how SORNA's registration requirement "should be implemented" to pre-Act offenders. 591 F.3d at 91. In *Reynolds*, this Court adopted the former reading, see 565 U.S. at 445, which the *Guzman* court had assumed arguendo, see 591 F.3d at 92-93.

SORNA is highly circumscribed." *Ibid.* SORNA "includes specific provisions delineating what crimes require registration; where, when, and how an offender must register; what information is required of registrants; and the elements and penalties for the federal crime of failure to register." *Ibid.* (citations omitted). Section 20913(d), *Guzman* concluded, merely authorizes the Attorney General to determine the applicability of SORNA's registration requirements, and "only with respect to the limited class of individuals who were convicted of covered sex offenses prior to SORNA's enactment." *Ibid.*

SUMMARY OF ARGUMENT

I. SORNA's delegation of authority to the Attorney General to specify the applicability of SORNA's statutory registration requirements to pre-SORNA sex offenders comports with this Court's precedent.

A. The Court has long held that, although Congress may not delegate legislative power, it may confer discretion on the Executive to implement and enforce federal law so long as it provides an "intelligible principle." *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928). A delegation passes muster under that standard "if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority." *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946). Applying that standard, the Court has upheld numerous delegations of authority across a wide range of substantive areas, including laws that carried criminal penalties. The Court has found only two statutory delegations to violate this standard, both of which provided no guidance to the Executive.

B. SORNA's delegation comports with this Court's precedent. Petitioner correctly does not dispute that

Congress "clearly delineate[d]" the official to whom it delegated authority (the Attorney General) and the "boundaries of th[at] delegated authority." *American Power & Light*, 329 U.S. at 105. Indeed, Congress itself "made virtually every legislative determination" and confined "the Attorney General's discretion to a narrow and defined category": determining the applicability of a statutory registration requirement to pre-SORNA sex offenders. *United States* v. *Ambert*, 561 F.3d 1202, 1214 (11th Cir. 2009). The only question here is whether Congress sufficiently identified the "general policy" that the Attorney General should pursue in making that determination. *American Power & Light*, 329 U.S. at 105.

It did. As this Court explained in *Reynolds* v. *United States*, 565 U.S. 432 (2012), SORNA's text and context make clear that Congress's general policy was to require sex offenders (including pre-Act offenders) to register to the maximum extent feasible. *Id.* at 442-445. That is exactly what the Attorney General has done. The narrow scope of the authority SORNA delegated confirms that the guidance Congress supplied is sufficient. The extent of the discretion SORNA confers is the same as a statute that required all pre-Act offenders to register but authorized the Attorney General to grant waivers to pre-Act offenders. Although such a statute would have established a different transition-period default rule for pre-Act offenders until the Attorney General acted, the scope of his authority—and thus the specificity with which Congress had to articulate the general policy—would be the same.

II. Petitioner argues in the alternative that heightened nondelegation scrutiny should apply to laws that raise retroactivity or federalism concerns and to laws that

authorize the Executive to define crimes. The Court need not reach those arguments for two reasons. First, because SORNA, properly construed, establishes a general policy that pre-SORNA offenders should be required to register to the extent possible, that policy provides sufficient guidance to the Attorney General under any level of scrutiny. Second, none of the specific concerns petitioner raises is implicated by SORNA, and this case therefore provides no occasion to address them. In any event, this Court already has rejected application of different, subject-matter-specific nondelegation standards in other contexts, and it has never held that the concerns petitioner raises require a special standard. Petitioner does not justify departing from this Court's precedent.

ARGUMENT

I. SORNA DELEGATED NONLEGISLATIVE POWER TO THE EXECUTIVE CONSISTENT WITH THIS COURT'S PRECEDENT

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." Art. I, § 1. The Court has explained that "[t]his text permits no delegation of those powers." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 472 (2001). The Court "ha[s] recognized, however, that the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches." *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989). The Court has accordingly held that Congress may confer discretion on the Executive to implement and enforce the laws so long as it supplies an "intelligible principle" defining the limits of that discretion. *Ibid.* (quoting *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928)).

As all 11 courts of appeals to address the issue have concluded, SORNA satisfies that standard. Read as a whole, the statute clearly conveys Congress's policy that pre-Act offenders be required to register to the extent feasible. SORNA's goal is to "establish[] a comprehensive national system for the registration of [sex] offenders," 34 U.S.C. 20901, and that policy "includes offenders who committed their offenses before [SORNA] became law," *Reynolds* v. *United States*, 565 U.S. 432, 442 (2012) (emphasis omitted). That the Attorney General may decide whether and when practical concerns mean that pre-Act offenders need not register should not be dispositive.

A. Congress May Delegate Discretion To The Executive If It Supplies An Intelligible Principle By Defining The General Policy, The Official To Whom Authority Is Delegated, And The Limits Of The Delegated Authority

As this Court has previously held, the Constitution does not "deny[] to the Congress the necessary resources of flexibility and practicality * * * to perform its function." *Yakus* v. *United States*, 321 U.S. 414, 425 (1944) (citation omitted). Accordingly, the Court "ha[s] 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" *American Trucking*, 531 U.S. at 474-475 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)). The Court's precedents likewise make clear that "Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers." *Yakus*, 321 U.S. at 425-426. Instead, the "extent and character of [the] assistance" Congress may seek from another branch in a particular context "must be fixed according to common sense and the inherent necessities

of the governmental co-ordination" at issue, *J.W. Hampton*, 276 U.S. at 406—matters Congress is typically best positioned to assess. See *Mistretta*, 488 U.S. at 372 (explaining importance of Congress's "ability to delegate" authority to address "ever changing and more technical problems"); *id.* at 416 (Scalia, J., dissenting) ("Congress is no less endowed with common sense than we are, and better equipped to inform itself of the 'necessities' of government," and "the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political.").

Consistent with that understanding, "[f]rom the beginning of the Government," Congress has enacted, and the Court has upheld, statutes "conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern." *United States* v. *Grimaud*, 220 U.S. 506, 517 (1911). As early as the Washington Administration, Congress enacted broad delegations that do not appear to have been challenged on nondelegation grounds in this Court. For example, the First Congress delegated authority to the Executive to license and regulate trade with Indian tribes, Act of July 22, 1790, ch. 33, 1 Stat. 137; to issue patents, Act of Apr. 10, 1790, ch. 7, 1 Stat. 109; and to regulate military-disability pay, Act of Apr. 30, 1790, ch. 10, § 11, 1 Stat. 119. Early Congresses also enacted a series of statutes that delegated to the President the power to impose or lift trade sanctions and tariffs. *Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 683-689 (1892).

The Court rejected a nondelegation challenge to one such statute in 1813. See *The Cargo of the Brig Aurora* v. *United States*, 11 U.S. (7 Cranch) 382 (1813). The Non-Intercourse Act of March 1, 1809, ch. 24, 2 Stat.

528, embargoed British and French ships from American ports. The Act expired after a year, but Congress renewed a revised version that made the embargo contingent on a presidential proclamation reviving the embargo as to either Great Britain or France. See *Marshall Field*, 143 U.S. at 682; Act of May 1, 1810, ch. 39, § 4, 2 Stat. 606. President Madison issued such a proclamation as to Great Britain. See *Marshall Field*, 143 U.S. at 682. The *Aurora*, a British ship, subsequently docked in New Orleans, and the government seized its cargo under the Act. *The Brig Aurora*, 11 U.S. (7 Cranch) at 387-388. The cargo's owner sued, contending that "Congress could not transfer the legislative power to the President" and that "[t]o make the revival of a law depend upon the President's proclamation, is to give to that proclamation the force of law." *Id.* at 386 (argument of counsel). The Court rejected that challenge, concluding that it could "see no sufficient reason[] why the legislature should not exercise its discretion in reviving the [Act], either expressly or conditionally, as their judgment should direct." *Id.* at 388.

Congress enacted similar trade statutes throughout the late 1700s and the 1800s. See *Marshall Field*, 143 U.S. at 683-689. It does not appear that the Court addressed another nondelegation challenge to such a law until 1892, when the Court in *Marshall Field* again upheld a statute making country-specific tariffs contingent on Presidential determinations. *Id.* at 681-694. The Court explained that *The Brig Aurora* and the history of "so many acts of Congress," which "embrac[ed] almost the entire period of our national existence," foreclosed the challengers' nondelegation argument. *Id.* at 691.

Applying the same principles, the Court rejected nondelegation challenges to a number of other statutes

through the early 1900s, including laws that carried criminal penalties. For example, in *In re Kollock*, 165 U.S. 526 (1897), the Court upheld a statute that authorized the Commissioner of Internal Revenue to issue regulations defining packaging requirements for oleomargarine and imposed criminal penalties for selling improperly packaged products. *Id.* at 532-533. In *Union Bridge Co.* v. *United States*, 204 U.S. 364, 387 (1907) (Harlan, J.), the Court sustained a statute that authorized the Secretary of War to order modifications to any bridge he found was "an unreasonable obstruction to the free navigation of" a navigable water way and imposed criminal penalties for refusal to make such modifications. *Id.* at 366 (statement of case) (citation omitted); see *id.* at 386-388 (upholding statute and explaining that a "denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be 'to stop the wheels of government' and bring about confusion, if not paralysis, in the conduct of the public business"). And *Grimaud* rejected a nondelegation challenge to a statute that authorized the Secretary of Agriculture to set rules for grazing in public forest reservations in order "to regulate their occupancy and use and to preserve the forests thereon from destruction," subject to criminal penalties for grazing without a permit. 220 U.S. at 515-517.

In 1928, the Court (per Chief Justice Taft) summarized its decisions as providing that "legislative action is not a forbidden delegation of legislative power," so long as "Congress shall lay down by legislative act an intelligible principle to which the person or body authorized" to exercise the delegated authority "is directed to conform." *J.W. Hampton*, 276 U.S. at 409.

Nearly 20 years later, the Court clarified that a delegation is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority." *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946).

Applying those principles over the last 90 years, the Court has upheld nearly every statutory delegation it has confronted, including delegations:

- To the President to set and adjust tariffs as needed to "equalize the * * * differences in costs of production" between foreign and domestic goods. *J.W. Hampton*, 276 U.S. at 401 (citation omitted); see *id.* at 407-411.
- To the Federal Communication Commission (FCC) to regulate broadcast licensing "as public interest, convenience, or necessity" requires. *National Broad. Co.* v. *United States*, 319 U.S. 190, 225-226 (1943) (*NBC*).
- To the Federal Power Commission to determine "just and reasonable" rates for wholesale sales of natural gas. *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944).
- To the Price Administrator to fix commodity prices that would be "fair and equitable" and would "effectuate the purposes of th[e] [Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23]"—the violation of which resulted in criminal sanctions. *Yakus*, 321 U.S. at 420 (citation omitted); see *id.* at 425-427.

- To the Securities and Exchange Commission (SEC) to prevent unfair or inequitable distribution of voting power among security holders. *American Power & Light*, 329 U.S. at 105.
- To the Secretary of War to determine and recover "excessive profits" from military contractors. *Lichter* v. *United States*, 334 U.S. 742, 785-786 (1948).
- To the Federal Home Loan Administration to make "rules and regulations * * * for the reorganization, consolidation, merger, or liquidation of [savings-and-loan] associations." *Fahey* v. *Mallonee*, 332 U.S. 245, 247, 249-250 (1947) (citation omitted).
- To the Sentencing Commission to promulgate then-binding Sentencing Guidelines establishing the permissible sentences for federal crimes. *Mistretta*, 488 U.S. at 374-377.
- To the Attorney General to designate controlled substances on a temporary basis—resulting in criminal penalties for unauthorized manufacture, possession, or distribution of such substances. *Touby* v. *United States*, 500 U.S. 160, 165-167 (1991).
- To the President to identify aggravating factors used to impose the death penalty in courts martial. *Loving* v. *United States*, 517 U.S. 748, 771-774 (1996).
- To the Environmental Protection Agency (EPA) to set nationwide air-quality standards limiting pollution to the level required "to protect the public health." *American Trucking*, 531 U.S. at 472 (quoting 42 U.S.C. 7409(b)(1)); see *id.* at 472-476.

In the Nation's history, only twice has the Court found that delegations exceeded Congress's authority. *American Trucking*, 531 U.S. at 474. In 1935, the Court concluded that two provisions of the National Industrial Recovery Act (Recovery Act), ch. 90, 48 Stat. 195—enacted in response to the Great Depression—contained "excessive delegations" because Congress "failed to articulate *any* policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power." *Mistretta*, 488 U.S. at 373 & n.7 (emphasis added). The Court held those provisions invalid because "one * * * provided literally no guidance for the exercise of discretion, and the other * * * conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *American Trucking*, 531 U.S. at 474. Since 1935, the Court has "upheld, again without deviation, Congress' ability to delegate power under broad standards." *Mistretta*, 488 U.S. at 373.

B. SORNA Comports With This Court's Precedent Because The Statute As A Whole Supplies An Intelligible Principle

This Court has thus long held that Congress may grant discretion to the Executive so long as it "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton*, 276 U.S. at 409. A delegation is "constitutionally sufficient if Congress clearly delineates" (1) "the general policy" to be pursued, (2) "the public agency which is to apply it," and (3) "the boundaries of th[e] delegated authority." *American Power & Light*,

329 U.S. at 105. As all 11 courts of appeals to address the issue have concluded, SORNA meets that standard.[4]

1. Congress identified the official to whom authority is delegated and the limits of the delegated authority

Petitioner does not directly address the *American Power & Light* standard in his brief, but he does not appear to dispute that SORNA satisfies its second and third prongs. As to the second prong, SORNA unquestionably identifies "the public agency which is to apply" SORNA's federal policy, *American Power & Light*, 329 U.S. at 105, by expressly vesting discretion in "[t]he Attorney General." 34 U.S.C. 20913(d).

As to the third prong, Congress also "clearly delineate[d] * * * the boundaries of th[e] delegated authority." *American Power & Light*, 329 U.S. at 105. Congress itself "made virtually every legislative determination in enacting SORNA, which has the effect of constricting the Attorney General's discretion to a narrow and defined category." *United States* v. *Ambert*,

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[4] See *United States* v. *Parks*, 698 F.3d 1, 7-8 (1st Cir. 2012), cert. denied, 569 U.S. 960 (2013); *United States* v. *Guzman*, 591 F.3d 83, 91-93 (2d Cir.), cert. denied, 561 U.S. 1019 (2010); *United States* v. *Cooper*, 750 F.3d 263, 266-272 (3d Cir.), cert. denied, 135 S. Ct. 209 (2014); *United States* v. *Sampsell*, 541 Fed. Appx. 258, 259-260 (4th Cir. 2013) (per curiam); *United States* v. *Whaley*, 577 F.3d 254, 262-264 (5th Cir. 2009); *United States* v. *Felts*, 674 F.3d 599, 606 (6th Cir. 2012); *United States* v. *Goodwin*, 717 F.3d 511, 516-517 (7th Cir.), cert. denied, 571 US. 929 (2013); *United States* v. *Kuehl*, 706 F.3d 917, 918-920 (8th Cir. 2013); *United States* v. *Richardson*, 754 F.3d 1143, 1145-1146 (9th Cir. 2014) (per curiam); *United States* v. *Nichols*, 775 F.3d 1225, 1230-1232 (10th Cir. 2014), rev'd on other grounds, 136 S. Ct. 1113 (2016); *United States* v. *Ambert*, 561 F.3d 1202, 1212-1214 (11th Cir. 2009); cf. *United States* v. *Ross*, 848 F.3d 1129, 1131 (D.C. Cir. 2017) (noting circuit consensus but finding it unnecessary to "reach the delegation issue").

561 F.3d 1202, 1214 (11th Cir. 2009). Congress "defined the crimes which necessitate registration" in the first place. *Ibid.* (citing 34 U.S.C. 20911). Congress prescribed "where the offender must register," the default "time period" and "method" for doing so, and "the nature of information that registrants must provide." *Ibid.* (citing 34 U.S.C. 20913(a)-(c), 20914(a)). And Congress defined "the elements of the new federal crime" of failing to register and "the penalty for violation." *Ibid.* (citing 18 U.S.C. 2250(a)).

Having addressed all of those matters in the statute, Congress accorded the Attorney General the "authority to specify the applicability of the requirements of this subchapter [*i.e.*, SORNA] to sex offenders convicted before the enactment of [SORNA] or its implementation in a particular jurisdiction," and also "to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with [Section 20913(b)]," 34 U.S.C. 20913(d), which sets the deadlines for "[i]nitial registration," 34 U.S.C. 20913(b). "The Attorney General" thus "is left only with the discretion to determine whether" SORNA's civil registration requirements "articulated by the legislature apply" to "a narrow and defined category" of sex offenders: "those convicted prior to July 27, 2006," when SORNA was enacted, or before SORNA's implementation in a particular jurisdiction. *Ambert*, 561 F.3d at 1214.[5]

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[5] Other SORNA provisions authorize the Attorney General to specify additional information about sex offenders to be included in registries, 34 U.S.C. 20914(a)(8) and (b)(8), to prescribe requirements regarding the time and manner for sex offenders to provide and update information, 34 U.S.C. 20914(c), and to adopt "guidelines and regulations to interpret and implement" SORNA, 34 U.S.C. 20912(b). Petitioner does not challenge any of those authorizations here.

2. Congress identified the general policy it intended the Attorney General to pursue

Petitioner appears to dispute (Br. 31-36, 41-50) the first *American Power & Light* prong: that Congress must identify the "general policy" for the Attorney General to pursue. 329 U.S. at 105. As the Court's decision in *Reynolds* demonstrates, however, SORNA's text and context make clear that Congress's general policy was to require sex offenders (including pre-Act offenders) to register to the maximum extent feasible. See 565 U.S. at 442-445. Petitioner's treatment (Br. 31-36) of Section 20913(d) as a barren grant of authority bereft of any guidance ignores the totality of the statutory text, critical context, and *Reynolds*.

a. SORNA's express "purpose" is to "protect the public from sex offenders and offenders against children" by "establish[ing] a *comprehensive* national system for the registration of those offenders." 34 U.S.C. 20901 (emphasis added). That purpose "*includes* offenders who committed their offenses before [SORNA] became law." *Reynolds*, 565 U.S. at 442. As *Reynolds* explained, the text of "[t]he Act reflects that purpose when it defines 'sex offender' broadly to include any 'individual who was convicted of a sex offense.'" *Ibid.* (quoting 34 U.S.C. 20911(1)).

The Act's historical context confirms its text. Congress had previously enacted several statutes designed to ensure that sex offenders register, but those efforts had left significant gaps and inconsistencies. See pp. 2-4, *supra*. As the Court recounted in *Reynolds*, Congress was concerned that more than 100,000 convicted sex offenders were already "missing from the system." 565 U.S. at 443. Ensuring "registration of pre-Act offenders" was therefore a central part of the problem that

SORNA was enacted to solve. *Id.* at 442; see *Ambert*, 561 F.3d at 1213 (Congress "created SORNA with the specific design to provide the broadest possible protection to the public, and to children in particular, from sex offenders"). Petitioner's focus on Section 20913(d) in isolation fails to account for the Act's other provisions and its history, which bring SORNA's general policy into sharp relief.

Indeed, the Court already observed in *Reynolds* that Congress wanted to cover pre-SORNA offenders, but left to the Attorney General implementation of that directive to the extent possible in light of potential practical problems. At issue in *Reynolds* was whether SORNA's registration requirements applied to pre-Act offenders before the Attorney General so specified. 565 U.S. at 439. The Court determined that construing the registration requirement to apply automatically to pre-Act offenders (with the Attorney General able "only to make exceptions" to such blanket coverage) was unnecessary because it was readily apparent when SORNA was enacted that Congress intended the Attorney General to require pre-Act offenders to register to the maximum extent feasible. *Id.* at 445. The Court found "no reason to believe that Congress feared that the Attorney General would refuse to apply the new requirements to pre-Act offenders," and thus "no need for a mandatory requirement to avoid that unrealistic possibility." *Id.* at 444-445. The Court's interpretation of SORNA thus rested on the premise that the Act's general policy is clear.

The Attorney General implemented that policy in 2007 by specifying that all pre-Act offenders were required to register. 28 C.F.R. 72.3 (2008). Contrary to petitioner's suggestion (Br. 32), that rule has remained in force ever since. See 28 C.F.R. 72.3. Although one of

the rule's illustrative examples was clarified in 2010, the regulation's operative text has not changed. *Ibid.* And even the clarification—made "to avoid any arguable inconsistency with [this] Court's holding in *Carr* [v. *United States*, 560 U.S. 438 (2010)]," 75 Fed. Reg. at 81,853—embodies the same general policy of requiring pre-Act offenders to register to the maximum extent feasible. Petitioner argues (Br. 32-33) that over time Attorneys General have modified the requirements that jurisdictions must meet to satisfy SORNA's funding conditions. But the registration duty that SORNA and the regulation impose on pre-Act sex offenders has been constant.

b. *Reynolds* also explained why, even though SORNA's general policy regarding registration of pre-Act offenders was clear, Congress deemed it necessary to grant discretion to the Executive. The mechanics of applying SORNA's "new registration requirements to pre-Act offenders" raised logistical questions and presented "what Congress may well have thought were practical problems." *Reynolds*, 565 U.S. at 440; see *id.* at 441-443. As Section 20913(d)'s text reflects, one concern was how SORNA's registration deadlines would apply to pre-Act offenders "who are unable to comply with" them. 34 U.S.C. 20913(d). Section 20913(b) provides that a sex offender "shall initially register * * * before completing [his] sentence of imprisonment," or within three business days of being sentenced if no "term of imprisonment" is imposed. 34 U.S.C. 20913(b). For offenders who had completed their prison sentences before SORNA's enactment and still were required to register, that deadline already would have passed, creating "uncertainties" about when such pre-Act offenders must register. *Reynolds*, 565 U.S. at 442; see *id.* at 442-443.

In addition, a principal goal of SORNA was "to make more uniform a patchwork of pre-existing state [registration] systems." *Reynolds*, 565 U.S. at 440. That in turn required changing the registration rules in some States, including "newly registering or reregistering 'a large number' of pre-Act offenders," which could have been both costly and cumbersome. *Ibid.* Solving these problems required federal-state cooperation and judgment about what would be feasible in the new nationwide registration system.

To address those concerns, Congress adopted the "efficient and desirable solution" in Section 20913(d) of "[a]sking the Department of Justice, charged with responsibility for implementation, to examine these" and other "pre-Act offender problems and to apply the new registration requirements accordingly." *Reynolds*, 565 U.S. at 441. "A ruling from the Attorney General" on these matters "could diminish or eliminate th[e] uncertainties" created by translating the new registration requirements to pre-Act offenders. *Id.* at 441-442. The Attorney General was particularly well positioned to examine these questions and provide practical guidance in light of the Department of Justice's experience in this area. In the 12 years between Congress's first legislation in this area and SORNA's enactment in 2006, the Attorney General had administered national standards for sex-offender registration, overseen the effort to implement conforming programs in all 50 States, and established a national sex-offender database. See *Ambert*, 561 F.3d at 1214 n.3; see also p. 3, *supra*.

Nothing about Congress's decision to harness the Attorney General's expertise and experience to address these implementation problems negated the "general policy," *American Power & Light*, 329 U.S. at 105, that

Congress established in SORNA. The delegation of authority to address transition-period implementation issues concerning pre-Act offenders did not erase SORNA's overriding objective to "establish[] a comprehensive national system for the registration of [sex] offenders," 34 U.S.C. 20901, designed to "provide the broadest possible protection to the public," *Ambert*, 561 F.3d at 1213. Congress merely "delegat[ed] to the Attorney General the judgment whether" that clear general policy "would be offset, in the case of pre-SORNA sexual offenders, by problems of administration, notice and the like for this discrete group of offenders—problems well suited to the Attorney General's on-the-ground assessment." *United States* v. *Parks*, 698 F.3d 1, 7-8 (1st Cir. 2012), cert. denied, 569 U.S. 960 (2013).

c. At a minimum, the general policy Congress identified in SORNA is more than sufficient given the limited scope of the authority it delegates. Petitioner concedes (Br. 16) that "the degree of agency discretion that is acceptable varies according to the scope of the power" delegated. *American Trucking*, 531 U.S. at 475. When Congress grants the Executive sweeping authority—such as power to "set[] air standards that affect the entire national economy"—Congress "must provide substantial guidance" to the agency. *Ibid.* In contrast, when Congress confers narrow authority—such as the discretion to define a minor statutory term—it "need not provide any direction." *Ibid.*

Put differently, "the question to be asked is not whether there was any explicit principle telling the" Executive how to exercise its statutory discretion, "but whether any such guidance was needed, given the nature of the delegation and the officer who is to exercise the delegated authority." *Loving*, 517 U.S. at 772.

Loving upheld against a nondelegation challenge a statute authorizing the President to select aggravating factors for the death penalty in military cases. *Id.* at 771-774. The absence of specific statutory direction concerning how to select those factors was immaterial because "the delegation [was] set within boundaries the President may not exceed" and because the delegation fell within the "traditional authority" of the Executive official at issue—*i.e.*, the President's prerogative to set rules for the military. *Id.* at 772.

Here, as in *Loving*, the limited scope of the authority SORNA confers on the Attorney General made detailed statutory direction unnecessary. The "Attorney General's discretion" is confined "to a narrow and defined category" of sex offenders: "those convicted" of qualifying sex offenses "prior to July 27, 2006," when SORNA was enacted, or prior to SORNA's implementation in a particular jurisdiction. *Ambert*, 561 F.3d at 1214. And the Attorney General's authority with respect to that "class of offenders" is limited to determining whether they must comply with SORNA's civil registration requirements, all the key aspects of which are spelled out in the statute itself. *Ibid.* Section 20913(d) does not empower the Attorney General to impose any additional obligations. He may determine only whether already convicted sex offenders, whose crimes would trigger SORNA's registration duty if they had been committed after SORNA, should be required to register or instead be exempt. That limited discretion dovetails with the Attorney General's role in administering national standards for sex-offender registries. Given the narrow scope of the Attorney General's discretion, no more specific congressional "direction," *American Trucking*, 531 U.S. at 475, was needed.

Indeed, the scope of the authority SORNA granted the Attorney General is no different for nondelegation purposes from the discretion to exempt otherwise covered individuals from the duty to register. Many statutes authorize the Executive to grant exemptions from otherwise applicable requirements.[6] Congress could have adopted that approach in SORNA without altering the extent of the Attorney General's authority. Cf. *Reynolds*, 565 U.S. at 450 (Scalia, J., joined by Ginsburg, J., dissenting) (observing that "giv[ing] the Attorney General the power to reduce congressionally imposed requirements" would "'pose[ ] no constitutional question'" (citation and emphasis omitted)).

To be sure, such a statute would have established a different default rule for the transitional period from SORNA's enactment until the Attorney General acted. Had Congress expressly imposed SORNA's registration requirement on all pre-Act offenders and empowered the Attorney General to make exceptions, pre-Act offenders would have been subject to the registration requirements immediately. In contrast, under Section 20913(d), pre-Act offenders were not required to register until the Attorney General took action. As the Court explained in *Reynolds*, Congress had good reasons for setting a default rule that did not require pre-Act

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[6] See, *e.g.*, 7 U.S.C. 1637b(b)(2)(D) (reporting requirements for small dairy producers); 15 U.S.C. 78u-5(g) (various securities-law requirements); 15 U.S.C. 78j-1(m)(3)(C) (audit-committee independence requirements); 15 U.S.C. 5711(a)(5) (requirements on pay-per-call services); 16 U.S.C. 823a(b) (requirements for hydroelectric facilities); 29 U.S.C. 1112(c) (bonding requirements for employee-benefit plans); 46 U.S.C. 4305 (recreational-vessel requirements); 49 U.S.C. 20306, 47528(b) (railroad-equipment and aircraft-noise-control requirements).

offenders to register until the Attorney General took action. See 565 U.S. at 440-442, 444-445.

But regardless of the transition-period default rule Congress established in SORNA, the *scope* of the Attorney General's decisionmaking authority—and thus the degree of specificity with which Congress had to articulate the statute's general policy—would be the same. Under both SORNA and a statute conferring authority to exempt pre-Act offenders from the registration requirement in light of practical concerns, the Attorney General could make the same ultimate decision: whether and which pre-Act offenders must register. And either way, the general policy Congress conveyed to require registration to the extent practicable is sufficient under this Court's precedent.

3. Petitioner's contrary arguments lack merit

a. Petitioner urges (Br. 46) the Court to read Section 20913(d) in a vacuum by ignoring SORNA's statements of purpose because they are not "tied to" the delegation provision itself. But courts "do not . . . construe statutory phrases in isolation"; they must instead "read statutes as a whole." *Samantar* v. *Yousuf*, 560 U.S. 305, 319 (2010) (citation omitted). "Statutory construction * * * is a holistic endeavor," and "[a] provision that may seem ambiguous in isolation" may be "clarified by the remainder of the statutory scheme," including when "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Savs. Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (Scalia, J.).

Consistent with that approach, the Court has previously relied on Congress's express statements of purpose —including in separate statutory provisions—in determin-

ing that a grant of discretion did not constitute an impermissible delegation of legislative authority. For example, in *NBC*, the Court addressed provisions of the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, charging the FCC with regulating broadcast licensing "as public interest, convenience, or necessity" requires. 319 U.S. at 215, 225. The Court rejected a nondelegation challenge to those provisions. *Id.* at 225-226. The Court explained that, even assuming the delegation would be invalid if "construed as comprehensively as the words alone permit," the statutory context—including "'the purpose of the Act'" set forth in a separate statutory provision, together with the statutory "'context'" and "'the requirements'" the statute itself "'impose[d]'"—showed that the public-interest criterion was not "'a mere general reference to public welfare without any standard to guide determinations.'" *Id.* at 226 (quoting *New York Cent. Sec. Corp.* v. *United States*, 287 U.S. 12, 24 (1932)); see *id.* at 214; see also *New York Cent. Sec.*, 287 U.S. at 24-25; *Grimaud*, 220 U.S. at 515-516. Likewise here, the Court cannot look only at Section 20913(d) in isolation. The entirety of SORNA's text and context can and should be read to inform the Attorney General's exercise of his discretion under Section 20913(d), which avoids any nondelegation concern. See *Mistretta*, 488 U.S. at 373 n.7 (explaining that Court has avoided constitutional concerns by "giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional").

b. Petitioner alternatively contends (Br. 47) that SORNA's express purpose of "protect[ing] the public" by "establish[ing] a comprehensive national system for the registration of [sex] offenders," 34 U.S.C. 20901, is too generalized to provide adequate guidance regarding pre-

Act offenders. But as this Court has recognized, Congress's objective to encompass pre-Act offenders is clear from SORNA's text and context. *Reynolds*, 565 U.S. at 442. "The Act reflects" Congress's purpose to create a "'comprehensive national system'" for registration "that *includes* offenders who committed their offenses before the Act became law." *Ibid.* (quoting 34 U.S.C. 20901). Petitioner relatedly argues that Congress did not pursue that purpose "at all costs" because other SORNA provisions do not "cover as many offenders as possible in every situation." Pet. Br. 47, 49 (citation omitted); see *id.* at 47-50. But the fact that Congress itself drew some lines and excluded some offenders from the statute's scope does not diminish the general policy favoring registration of covered sex offenders (including pre-Act offenders) who do otherwise satisfy the statute's criteria.

Petitioner further contends (Br. 31) that SORNA's purpose and context are insufficient because they do not specify particular "criteria an Attorney General should (or should not) consider." This Court's decisions make clear that Congress was not required to supply such granular direction. Even for statutes that confer much broader authority than Section 20913(d), the Court has held that Congress need not "provide a 'determinate criterion' for saying 'how much of the regulated harm is too much.'" *American Trucking*, 531 U.S. at 475 (brackets and citation omitted). The Court has repeatedly upheld delegations that identify a general standard—for example, authority to license radio broadcasters "as public interest, convenience, or necessity" requires, *NBC*, 319 U.S. at 225-226; to set "just and reasonable" rates for natural gas, *Hope Natural Gas*, 320 U.S. at 600; and to establish commodity prices that would be "fair and equitable," *Yakus*, 321 U.S. at 427; see *Avent* v. *United*

States, 266 U.S. 127, 130 (1924) (Holmes, J.) (statute authorizing emergency rules for railroad-equipment shortages that are "reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed"); see also *Loving*, 517 U.S. at 758 (explaining that to "burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government").

The Court also has declined to require that Congress quantify or otherwise predetermine the precise degree of harm or range of conduct to regulate. In *Touby*, for example, the Court upheld the delegation in the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, to the Attorney General to designate controlled substances on a temporary basis (triggering criminal consequences). 500 U.S. at 164-167. The Court "did not require the statute to decree how 'imminent' was too imminent, or how 'necessary' was necessary enough, or even * * * how 'hazardous' was too hazardous." *American Trucking*, 531 U.S. at 475 (citation omitted). So too here, in creating a "comprehensive national system for the registration of [sex] offenders" designed "to protect the public," 34 U.S.C. 20901, Congress was not required by this Court's precedent to specify just how "comprehensive" that system should be or exactly how much "protect[ion]" (*ibid.*) from pre-Act offenders was needed.

Those are precisely the sorts of details that petitioner faults Congress for not addressing in SORNA: for instance, whether the Attorney General should have required registration of offenders with very old sex crimes (Br. 31), or how to determine when the registration period began to run for a pre-SORNA offender (Br. 33). Respecting our constitutional structure does not

turn on those particulars. Instead, this Court's precedents make clear that what the separation of powers demands is that SORNA conveyed a general policy to require pre-Act offenders to register to the extent feasible. See pp. 15-21, *supra*. Indeed, petitioner does not appear to contest that SORNA would pass muster if it explicitly stated: the Attorney General is authorized to specify the applicability of SORNA's registration requirements to pre-Act offenders "to the maximum extent he finds to be feasible." And the Court in *Reynolds* already recognized that SORNA's text and context together convey that instruction. No additional instruction was necessary.

c. Petitioner attempts (Br. 34-35) to analogize SORNA to the only two statutory provisions the Court has ever held to violate the nondelegation doctrine in *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), and *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935). Both cases concerned provisions of the Recovery Act, a comprehensive law "to regulate the entire economy" enacted at the beginning of the Franklin D. Roosevelt Administration in the depths of the Great Depression. *American Trucking*, 531 U.S. at 474. The fatal flaw the Court identified in each provision was that "Congress had failed to articulate *any* policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power." *Mistretta*, 488 U.S. at 373 n.7 (emphasis added). By contrast here, Congress said in SORNA that it wanted to "establish a *comprehensive* national system for the registration of [sex] offenders," 34 U.S.C. 20901 (emphasis added), and this Court recognized in *Reynolds* that Congress's policy "*includes* offenders who committed their offenses before [SORNA] became law," 565 U.S. at 442. SORNA is thus importantly

different from the rudderless grants of authority in the Recovery Act.

More specifically, *Panama Refining* involved Section 9(c) of the Recovery Act, which authorized the President "to prohibit the transportation in interstate and foreign commerce of petroleum * * * withdrawn from storage in excess" of state-set quotas and also specified a penalty for violating any such potential prohibition. 293 U.S. at 406 (citation omitted). The Court held the law invalid because it "establishe[d] no criterion to govern the President's course." *Id.* at 415. The Act's goals also did little to inform the President's decisionmaking. Its "general outline of policy * * * favor[ed] the fullest possible utilization of the present productive capacity of industries" to mobilize the economy and speed economic recovery. *Id.* at 417-418. But Section 9(c) asked the President to determine instances in which such "fullest possible utilization"—*i.e.*, marketing oil above State-imposed quotas—should be a crime. *Id.* at 406. Virtually any invocation of the President's power therefore would have been in substantial tension with the Act's central goal, and the Court concluded that the statute gave no indication of the countervailing "circumstances or conditions in which" departing from that central goal would be warranted. *Id.* at 418. Here, as the *Reynolds* Court explained, Congress wanted pre-SORNA offenders to register to the extent practicable, see 565 U.S. at 445, and the Attorney General's exercise of his authority under Section 20913(d) is fully consistent with Congress's objective.

Schechter Poultry is even further afield. There, the Court reversed convictions under the Code of Fair Competition for the Live Poultry Industry, promulgated under Section 3 of the Recovery Act. 295 U.S. at

521. Section 3 permitted a trade association to write a code of fair competition to govern its industry and ask the President to approve it. *Id.* at 521 n.4. The President could approve the proposed code so long as the trade association "impose[d] no inequitable restrictions on admission to [its] membership" and the code was "not designed to promote monopolies." *Ibid.* (citation omitted). The Live Poultry Code covered parts of three States and set rules encompassing everything from laborers' working hours and conditions, to quality control, to a requirement that prohibited wholesalers from allowing retailers to select individual chickens (rather than purchasing whole or half coops). *Id.* at 524-528.

This Court held that Congress had not "established the standards of legal obligation" because it did not provide "any adequate definition of the subject to which the codes [were] to be addressed" and did "not define 'fair competition.'" *Schechter Poultry*, 295 U.S. at 530-531. Section 3 "supplie[d] no standards for any trade, industry or activity," instead granting the President "virtually unfettered" discretion. *Id.* at 541-542. And it "prescribed no method of attaining" its goal of "rehabilitat[ing] industry"; provided no limitations on the "nature" of the codes that could be created; and "delegated, not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated" the power to write the codes. *Yakus*, 321 U.S. at 424 (discussing *Schechter Poultry*); see *Department of Trans.* v. *Association of Am. R.R.*, 135 S. Ct. 1225, 1237-1238 (2015) (Alito, J., concurring) (distinguishing delegations to federal agencies from those to nongovernmental entities).

SORNA suffers none of those flaws. The statute specifically delineates the subject the Attorney General is

authorized to address: the applicability of statutory registration requirements to a defined subset of otherwise covered sex offenders. Congress also identified both the statutory objective and the method of attaining it: requiring sex offenders to register as part of a comprehensive national system. And petitioner does not dispute that Congress intended the Attorney General to exercise his authority to require pre-Act offenders to register. SORNA is therefore far removed from the provisions in *Panama Refining* and *Schechter Poultry* that exceeded the outer limits of Congress's power.

II. PETITIONER'S ARGUMENTS THAT THE COURT SHOULD APPLY A SPECIAL, HEIGHTENED NONDELEGATION STANDARD TO SORNA LACK MERIT

Unable to show that SORNA impermissibly delegates legislative power under this Court's precedent, petitioner urges (Br. 19-21, 23-25, 28-41) the Court to apply a different, more stringent nondelegation test. But because SORNA, properly construed, establishes a general policy that pre-SORNA offenders should be required to register to the extent possible, the statute provides sufficient guidance to the Attorney General under any level of scrutiny. As the Court recognized in *Reynolds*, Congress intended and expected the Attorney General to exercise his authority to encompass pre-Act offenders if feasible. See 565 U.S. at 442-445. The limited scope of the Attorney General's discretion concerning only a defined subset of sex offenders, the narrow authority Congress conferred to require such offenders to register, and the practical concerns that prompted Congress to vest that discretion in the Executive, see pp. 21-31, *supra*, all confirm that SORNA passes muster under any test. It is therefore unnecessary for this

Court to consider any of petitioner's arguments for some level of heightened scrutiny.

It is unnecessary for a second reason as well. Petitioner contends that heightened nondelegation scrutiny should apply to laws that raise retroactivity or federalism concerns and to laws that authorize the Executive to define crimes. But as explained below, SORNA does not implicate any of those concerns. In any event, the Court has already rejected "application of a different and stricter nondelegation doctrine" based on the topic a statute regulates or the constitutional authority Congress is exercising, *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 222 (1989); see *id.* at 220-223 (taxing power); *Loving*, 517 U.S. at 767 (regulation of the military); *J.W. Hampton*, 276 U.S. at 409 (customs duties), and it has never held that any of the concerns petitioner raises requires a higher standard. Petitioner does not justify departing from the Court's precedent.

A. SORNA Does Not Implicate Retroactivity Concerns

Petitioner suggests (Br. 37-38) that heightened nondelegation scrutiny should apply to SORNA because the statute raises retroactivity concerns. That is incorrect. SORNA raises no retroactivity concerns because its registration requirements and criminal penalties apply only prospectively. When Section 20913 was enacted, it did not purport to require sex offenders to have registered already. And this Court made clear in *Carr* that SORNA's criminal provision, 18 U.S.C. 2250(a), does not impose any criminal penalties for failing to register before SORNA's enactment. See *Carr*, 560 U.S. at 447 (SORNA did not impose criminal penalties for failing to register until a sex offender became "subject to SORNA's registration requirements," which "c[ould] occur only after the statute's effective date").

Petitioner's contention (Br. 37) that SORNA imposes criminal consequences based on past conduct is therefore mistaken. For all covered sex offenders, the statute imposes punishment only if a pre-Act offender fails to register going forward, *i.e.*, after becoming subject to SORNA. For pre-Act offenders like petitioner, that did not occur until the Attorney General issued the interim rule in 2007. See *Reynolds*, 565 U.S. at 439-446. And offenders like petitioner who had been convicted of state-law sex offenses before SORNA could not face sanctions under SORNA unless and until they also traveled in interstate or foreign commerce after SORNA took effect and then failed to register. 18 U.S.C. 2250(a); see *Carr*, 560 U.S. at 445-450. In this respect, SORNA is no different from any statute that imposes a prospective obligation to report or publicly disclose facts concerning past conduct.

Even assuming SORNA applies retroactively, petitioner cites no decision of this Court applying a special nondelegation test to laws with retroactive application. He is correct (Br. 29) that the Court ordinarily presumes statutes do not apply retroactively "unless Congress ha[s] made clear its intent" to the contrary, *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994), and "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood" to authorize "retroactive rules" unless Congress so provides, *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). It follows from those presumptions that Congress must clearly authorize the Executive to promulgate regulations that apply retroactively. But it does *not* follow that, when Congress clearly authorizes the Executive to act with retroactive effect, its legislation should be judged under a special test for nondelegation

purposes. The relevant inquiry remains whether Congress has defined the official to whom the (retroactive) authority is delegated, the limits of that delegated authority, and the general policy that the official is to pursue in exercising that authority.

Petitioner's suggestion in passing (Br. 37 n.6) that the Court should apply a higher nondelegation standard to avoid constitutional doubts under the Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3, fails for similar reasons. As every court of appeals to address the issue has concluded—several even before *Carr*—SORNA presents no ex post facto problem.[7] *Carr*'s holding that SORNA imposes punishment only for a sex offender's failure to register after SORNA took effect, 560 U.S. at 445-450, confirms that conclusion. In any event, the Court has not applied special nondelegation standards merely because a statute implicates some other constitutional question. See, *e.g.*, *NBC*, 319 U.S. at 225-226 (applying intelligible-principle test to radio-broadcast regulations implicating First Amendment issues).

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[7] See *Parks*, 698 F.3d at 4-6; *United States* v. *Elkins*, 683 F.3d 1039, 1043-1045 (9th Cir. 2012); *Felts*, 674 F.3d at 605-606; *United States* v. *Leach*, 639 F.3d 769, 772-773 (7th Cir. 2011); *United States* v. *Shenandoah*, 595 F.3d 151, 158-159 (3d Cir.), cert. denied, 560 U.S. 974 (2010), abrogated on other grounds by *Reynolds*, *supra*; *Guzman*, 591 F.3d at 94; *United States* v. *Young*, 585 F.3d 199, 203-206 (5th Cir. 2009) (per curiam); *United States* v. *Gould*, 568 F.3d 459, 466 (4th Cir. 2009), cert. denied, 559 U.S. 974 (2010); *Ambert*, 561 F.3d at 1207-1208; *United States* v. *Hinckley*, 550 F.3d 926, 935-938 (10th Cir. 2008), cert. denied, 556 U.S. 1240 (2009), abrogated on other grounds by *Reynolds*, *supra*; *United States* v. *May*, 535 F.3d 912, 919-920 (8th Cir. 2008), cert. denied, 556 U.S. 1258 (2009), abrogated on other grounds by *Reynolds*, *supra*; cf. *Smith* v. *Doe*, 538 U.S. 84, 92-106 (2003) (considering Alaska's similar regime).

B. SORNA Does Not Implicate Federalism Concerns In This Context

Petitioner also contends (Br. 38-39) that a higher standard should apply where "state sovereign interests" are implicated. But the relevant SORNA provisions do not implicate the States. The statute under which petitioner was prosecuted, 18 U.S.C. 2250(a), applies only to individuals, not to the States. And the underlying provisions that required petitioner to register as a sex offender, 34 U.S.C. 20913(a)-(c), also impose obligations only on sex offenders, not state governments. Even assuming the relevant provisions of SORNA raise any federalism concerns, petitioner does not explain why those concerns, beyond requiring Congress to legislate clearly when it comes to the States, should subject clear legislation to a higher standard for nondelegation purposes. And he identifies no decision of this Court applying special nondelegation standards because of federalism concerns.

To be sure, SORNA does contain other provisions that do affect States, but none of them bears on petitioner's conviction. In other provisions of SORNA, Congress "used Spending Clause grants to encourage States to adopt its uniform definitions and requirements," but "[i]t did not insist that the States do so." *United States* v. *Kebodeaux*, 570 U.S. 387, 397-398 (2013); *e.g.*, 34 U.S.C. 20927(a) and (d). Some States have done so; others have not.[8] Congress's use of funding conditions to encourage cooperation from States is commonplace, and petitioner does not attempt to show that Congress exceeded its Spending Clause authority

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[8] Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, U.S. Dep't of Justice, *SORNA State and Territory Implementation Progress Check* (Apr. 5, 2018), https://www.smart.gov/pdfs/SORNA-progress-check.pdf.

in SORNA. See *South Dakota* v. *Dole*, 483 U.S. 203, 207-208 (1987); see also *Kebodeaux*, 570 U.S. at 397-398. In any event, as lower courts have consistently recognized, neither petitioner's duty to register under Section 20913 and the regulations nor his conviction under Section 2250(a) depended on SORNA's funding conditions or any State's compliance with them. See *United States* v. *Felts*, 674 F.3d 599, 603-605 (6th Cir. 2012) (collecting cases); Guidelines, 73 Fed. Reg. at 38,046. Any concerns such conditions might raise in other contexts are thus irrelevant here.

In a footnote, petitioner questions (Br. 40 n.7) Congress's Article I authority to impose SORNA's registration requirements on state sex offenders. The district court rejected that argument, J.A. 90, and petitioner did not renew the argument in the court of appeals, Pet. C.A. Br. 10-24, which accordingly did not address it, J.A. 12-18; see *United States* v. *Williams*, 504 U.S. 36, 41 (1992). The argument also is outside the scope of the single question on which the Court granted certiorari, see *Thornton* v. *United States*, 541 U.S. 615, 622 n.2 (2004), and has no bearing on the standard that governs petitioner's nondelegation challenge. Moreover, any challenge to Section 20913's registration requirements would be academic here because petitioner was convicted of violating 18 U.S.C. 2250(a) for failing to register after traveling in interstate commerce. Petitioner does not dispute, and every court of appeals to address

the issue has concluded, that Section 2250(a) is a valid exercise of Congress's interstate-commerce authority.[9]

C. SORNA Does Not Empower The Attorney General To Create Federal Crimes

1. Petitioner additionally contends (Br. 20) that heightened nondelegation scrutiny should apply to SORNA because it empowers the Attorney General to "define[] crimes." Pet. Br. 19-21, 24; see ACLU Amicus Br. 5-24; Araiza et al. Amicus Br. 18-24. That is incorrect. If SORNA in fact authorized the Executive to create new federal crimes out of whole cloth, that would raise substantial constitutional questions about nondelegation (under any standard). But in enacting SORNA, Congress itself established the new crime of failing to register and prescribed the elements of and punishment for that offense. 18 U.S.C. 2250(a). Congress also separately imposed the underlying "civil registration requirement." *Kebodeaux*, 570 U.S. at 395; *Felts*, 674 F.3d at 606 (SORNA registration is a civil requirement); see 34 U.S.C. 20913(a)-(c). The Attorney General's regulations implement that civil registration regime; they do not define any criminal offense. 28 C.F.R. 72.3.

The fact that the criminal offense in Section 2250(a) is predicated in part on the applicability of the civil registration requirement to a particular offender—which the Attorney General can determine for pre-Act offenders—

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[9] *Parks*, 698 F.3d at 6-7; *United States* v. *Coleman*, 675 F.3d 615, 619-621 (6th Cir.), cert. denied, 568 U.S. 826 (2012); *Guzman*, 591 F.3d at 89-91; *Shenandoah*, 595 F.3d at 160-161; *United States* v. *Zuniga*, 579 F.3d 845, 850 (8th Cir. 2009) (per curiam), cert. denied, 560 U.S. 954 (2010), abrogated on other grounds by *Reynolds*, *supra*; *Hinckley*, 550 F.3d at 939-940.

is unremarkable. Many statutes give agencies responsibility for decisions that in turn affect whether a particular individual will face criminal liability.[10] Indeed, in many statutes Congress has given agencies authority to prescribe substantive requirements in rules and regulations and has separately made it a crime to violate those requirements.[11]

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[10] See, *e.g.*, 15 U.S.C. 78g(c)(3)(B), 78ff (exempting certain forms of credit from restrictions that carry criminal penalties unless Federal Reserve Board regulations specify otherwise); 19 U.S.C. 1629(c) (authorizing Secretary of the Treasury to apply U.S. customs law in whichever foreign countries he chooses, including "criminal laws of the United States relating to the importation or exportation of merchandise, filing of false statements, and the unlawful removal of merchandise from customs custody"); 22 U.S.C. 614(b), 618 (requiring registered foreign agents to include a "conspicuous statement" of their status on certain communications, subject to criminal penalties, and authorizing Attorney General to define a "conspicuous statement").

[11] See, *e.g.*, 7 U.S.C. 87b(a)(13), 87c, 2024(b) (Department of Agriculture grain-inspection and food-stamp regulations); 15 U.S.C. 78ff(a) (SEC regulations); 15 U.S.C. 2068(a)(1), 2070 (Consumer Product Safety Commission regulations); 15 U.S.C. 2614(1), 2615(b) (toxic-substance-control regulations); 15 U.S.C. 3414(a) and (c)(2) (natural-gas regulations); 19 U.S.C. 1436(a)(4) and (c), 1459(e)(4) and (g) (customs and entry regulations); 29 U.S.C. 666(e) (Occupational Safety and Health Administration regulations); 31 U.S.C. 5322 (Treasury regulations respecting monetary-instruments transactions); 33 U.S.C. 1319(c), 1415(b) (EPA water-quality requirements and ocean-dumping regulations); 42 U.S.C. 4909(a), 4910(a), 6928(d), 6992d(b) (EPA noise-control, solid-waste-management, and medical-waste regulations); 42 U.S.C. 8432 (Department of Energy regulations); 43 U.S.C. 1350(c) (regulations for outer-continental-shelf leasing); 46 U.S.C. 3718(b) (regulations for inspection of vessels carrying dangerous liquid-bulk cargo); 49 U.S.C. 521(b)(6) (commercial-motor-vehicle safety requirements).

In particular, SORNA is one of a number of statutes that impose reporting or similar requirements and that make failure to report a criminal offense, while granting the Executive discretion concerning which persons or conduct are subject to the reporting obligation.[12] For example, a provision of the Bank Secrecy Act, 31 U.S.C. 5313(a), requires the Secretary of the Treasury to determine who "shall file a report on [a] transaction" "for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes)." *Ibid.* The willful violation of "a regulation prescribed" under the Bank Secrecy Act is a felony. 31 U.S.C. 5322. Exercising that authority, the Secretary has determined that "[e]ach financial institution other than a casino" must file the reports for transactions exceeding $10,000. 31 C.F.R. 1010.311. That Congress has conferred authority to agencies regarding those reporting requirements does not mean that Congress has improperly outsourced its power to establish federal crimes. See, *e.g.*, *United States* v. *Sans*, 731 F.2d 1521, 1528 (11th Cir. 1984) (rejecting nondelegation challenge to previous version of 31 U.S.C. 5313(a)), cert. denied, 469 U.S. 1111 (1985).

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[12] See, *e.g.*, 15 U.S.C. 78p(e), 78u-5(b), 78ff (exempting certain transactions and statements from statutory disclosure and other requirements, which carry criminal penalties, unless in violation of SEC regulations); 49 U.S.C. 5108(a)(2), 5124 (authorizing Secretary of Transportation to require registration statements from persons transporting hazardous materials and imposing criminal penalties for violations); 49 U.S.C. 11145(a)(1), 11903 (authorizing Surface Transportation Board to require reports from rail carriers and imposing criminal penalties for willfully filing a false report); 49 U.S.C. 14123(a)(2), 14907 (similar for motor carriers); 49 U.S.C. 15723, 16102 (similar for pipeline carriers).

2. This Court has upheld statutes that delegate authority to the Executive to make determinations that in turn affect criminal liability, applying the same standards it has applied to other delegations. See, *e.g.*, *Yakus*, 321 U.S. at 427; *Avent*, 266 U.S. at 130; *McKinley* v. *United States*, 249 U.S. 397, 399 (1919); *Grimaud*, 220 U.S. at 517-520; *Monongahela Bridge Co.* v. *United States*, 216 U.S. 177, 192-193 (1910); *Union Bridge*, 204 U.S. at 386-387; *Kollock*, 165 U.S. at 532-533. In so doing, the Court has expressly drawn the distinction between Executive authority to create new federal crimes and the lesser authority to determine subsidiary issues that indirectly affect criminal liability.

For example, in *Kollock*, the Court upheld a criminal conviction for selling oleomargarine in packaging that did not conform to Internal Revenue Service labeling regulations. 165 U.S. at 532-533. The defendant challenged his conviction on the ground that Congress could not "delegate to the commissioner of internal revenue * * * authority or power to determine what acts shall be criminal." *Id.* at 527 (statement of case). The Court rejected that argument because the *statute* identified the crime's elements and "prescribed the punishment," and thus "[t]he criminal offence [was] fully and completely defined by the act." *Id.* at 533. Congress itself had mandated compliance with the labeling requirements and had made violations of them a crime. The fact that some "detail[s]" of the offense were prescribed by the regulations was not dispositive; "[t]he regulation was in execution of, or supplementary to, but not in conflict with, the law itself, and was specifically authorized thereby in effectuation of the legislation which created the offence." *Ibid.* Similarly, in *Grimaud*, the Court upheld a conviction under a statute that made it an

offense to graze animals in a federal forest in violation of regulations adopted by the Secretary of Agriculture. 220 U.S. at 515-523. As the Court explained, the law was not problematic because "[a] violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress," and "[t]he statute, not the Secretary, fixes the penalty." *Id.* at 522.

Grimaud and *Kollock* each distinguished *United States* v. *Eaton*, 144 U.S. 677 (1892), in which the Court had held that an oleomargarine dealer could not be criminally punished for violating agency regulations that required certain bookkeeping practices—because Congress had not made violating those requirements a crime in the statute. *Id.* at 686-688; see *Grimaud*, 220 U.S. at 518-519; *Kollock*, 165 U.S. at 533, 535-537. As the Court explained in *Grimaud*, "the very thing which was omitted in" the statute in *Eaton* "ha[d] been distinctly done" in the statute *Grimaud* upheld: Congress itself had established the crime and determined the penalty. *Grimaud*, 220 U.S. at 519. The same was true in *Kollock*. See 165 U.S. at 532.

In SORNA, as in the statutes upheld in *Grimaud* and *Kollock*, Congress established the crime of failure to register and prescribed the penalty. 18 U.S.C. 2250(a). And Congress prescribed the underlying obligation to register. 34 U.S.C. 20913(a)-(c). That Congress authorized the Attorney General to determine whether a specific subset of sex offenders must comply with that underlying duty is not critical for nondelegation purposes. What matters is that Congress defined the "criminal offence." *Kollock*, 165 U.S. at 533.

3. More generally, the Court has upheld statutes in which Congress imposed criminal penalties for violating

rules Congress authorized agencies to adopt. In *Yakus*, for example, the Court upheld convictions under the Emergency Price Control Act of 1942, which authorized the Price Administrator to issue "orders fixing such maximum prices of commodities and rents as w[ould] effectuate" the Act's purposes. 321 U.S. at 419; see *id.* at 419-427. The Court rejected the defendants' contention that the delegation was unconstitutional. *Id.* at 423-427. The Court explained that the delegation was valid because "Congress ha[d] stated the legislative objective"; "prescribed the method of achieving that objective," *i.e.*, "maximum price fixing"; and "laid down standards to guide the administrative determination of both the occasions for the exercise of the price-fixing power, and the particular prices to be established." *Id.* at 423. Even *Panama Refining* and *Schechter Poultry* applied *J.W. Hampton*'s intelligible-principle test in evaluating delegations where violations carried criminal penalties. See *Panama Refining*, 293 U.S. at 429-430; *Schechter Poultry*, 295 U.S. at 541-542.

The Court has applied the same standard to uphold statutes that delegated discretion concerning criminal punishments themselves, explaining that "[t]here is no absolute rule * * * against Congress' delegation of authority to define criminal punishments." *Loving*, 517 U.S. at 768. In *Mistretta*, the Court applied the intelligible-principle standard to uphold Congress's delegation to the Sentencing Commission to promulgate the then-binding Sentencing Guidelines, which governed the imposition of sentences in federal criminal cases. 488 U.S. at 373-374. The Court explained that the "intelligible principle" standard governed and required that "Congress clearly delin[e]ate[] the general policy, the public agency which is to apply it, and the boundaries of this

delegated authority." *Id.* at 372-373 (citation omitted). The Court held that "Congress' delegation of authority to the Sentencing Commission" passed constitutional muster because Congress identified the "goals" and "purposes" for the Commission to pursue; it "prescribed the specific tool—the guidelines system—for the Commission to use"; and it imposed various "constraints" on the Commission's discretion. *Id.* at 374, 376 (citation omitted); see *id.* at 374-379; see also *id.* at 416 (Scalia, J., dissenting) (expressing "full[] agree[ment] with the Court's rejection of petitioner's contention that the doctrine of unconstitutional delegation of legislative authority has been violated because of the lack of intelligible, congressionally prescribed standards").

Indeed, the Court has indicated that the same analysis applies even where Congress vests discretion in the Executive concerning the availability of the death penalty. In *Mistretta*, applying ordinary nondelegation principles, the Court rejected the argument that Congress could not authorize the Commission to include capital punishment in Guidelines sentences for offenses for which a statute authorized the death penalty. 488 U.S. at 378 n.11. And in *Loving*, the Court likewise applied *J.W. Hampton*'s standard to uphold a delegation to the President to identify aggravating factors that could support a death sentence in a court martial. See 517 U.S. at 771-774. If ordinary nondelegation principles apply to the Sentencing Commission's authority to specify which criminal offenses are death-eligible (including under a then-binding regime), and to the President's authority to specify when criminal offenses in the military are death-eligible, surely the same principles should apply to the Attorney General's authority to specify as a *civil* matter when certain sex

offenders are required to register—even if the failure to register carries criminal consequences that Congress itself specified in SORNA.

4. Petitioner does not identify any case in which this Court adopted a heightened nondelegation standard for statutes carrying criminal penalties. He cites *United States* v. *Evans*, 333 U.S. 483 (1948), for the proposition that only Congress may "defin[e] crimes." Pet. Br. 20 (citation omitted). But *Evans* cast no doubt on the rule that Congress may impose criminal penalties for violations of agency rules that Congress has given the agency authority to adopt. Indeed, *Evans* did not address a nondelegation question at all. The case concerned a statute that enumerated two offenses but imposed a penalty for only one of them; the Court held that the Executive could not remedy Congress's mistake by interpreting the statute as implicitly imposing punishment for both acts. 333 U.S. at 484, 486-487. Here, Congress itself defined the elements of the failure-to-register offense and the punishment for committing that offense in 18 U.S.C. 2250(a).

Petitioner cites (Br. 20-21) various decisions addressing the vagueness doctrine. But the principle he derives from those cases—that "individuals are entitled to sufficient notice as to what constitutes a crime" (Br. 20)—does not mean such notice must come solely from a statute rather than in part from a regulation. Petitioner also cites (Br. 21) *Abramski* v. *United States*, 134 S. Ct. 2259 (2014), and *United States* v. *Apel*, 571 U.S. 359 (2014), for the proposition that the Executive's interpretation of federal criminal laws does not receive the same deference as its interpretation of other statutes. But this is not a case about interpreting Section 20913(d) or the Attorney General's regulation—neither of which is

ambiguous. Whether courts should defer to Executive interpretations of criminal statutes is a wholly different question from whether Congress can expressly confer on the Executive the authority to make determinations that affect criminal liability.

Petitioner's amici cite *Touby*, *supra*, in which the Court upheld a delegation of authority to the Attorney General in the Controlled Substances Act to designate controlled substances on a temporary basis. ACLU Amicus Br. 21-22; Araiza et al. Amicus Br. 18-20. But *Touby* did not embrace a different standard for criminal statutes. The petitioner in *Touby* conceded, and the Court agreed, that the statute supplied an intelligible principle. 500 U.S. at 165. He argued, however, that "something more than an 'intelligible principle' is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions." *Id.* at 165-166. Although the Court suggested that a passage in *Fahey*, *supra*, had created potential uncertainty on the point, *Touby*, 500 U.S. at 166 (stating that the Court's cases "are not entirely clear," and contrasting *Fahey* with *Mistretta*, *Yakus*, and *Grimaud*), *Touby* did not endorse petitioner's argument. Instead, the Court concluded that the Controlled Substances Act provision at issue "passe[d] muster even if greater congressional specificity [were] required." *Ibid.*

Moreover, *Fahey* did not adopt or apply a heightened standard to a statute imposing criminal sanctions. That issue was not presented because the case involved civil regulations governing savings-and-loan associations. 332 U.S. at 249-250. In upholding the delegation at issue, the Court (per Justice Jackson) distinguished *Panama Refining* and *Schechter Poultry* on the ground that the delegations in those cases had conferred power

to make "federal crimes of acts that never had been such before" and to create "new crimes in uncharted fields." *Ibid.* In context, those statements do not suggest that a different constitutional standard applies to regulations with penal consequences. They simply reflect what the Court subsequently explained in *Mistretta* (in a footnote that *Touby* cited): the delegations in *Panama Refining* and *Schechter Poultry* were invalid because they failed to "articulate *any* policy or standard that would serve to confine the [Executive's] discretion." 488 U.S. at 373 n.7 (emphasis added); see *Touby*, 500 U.S. at 166.

D. Petitioner Has Not Justified Departing From This Court's Nondelegation Cases

Petitioner also briefly invites (Br. 25) the Court to abandon its nondelegation precedent altogether, but he does not meaningfully engage with historical practice or this Court's precedent dating nearly to the Founding. See pp. 15-21, *supra*. As the Court summarized in *Grimaud*, "[f]rom the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern." 220 U.S. at 517. The fact "that Congress has frequently, from the organization of the government to the present time, conferred upon" the Executive authority to determine whether particular requirements apply to certain entities "is entitled to great weight." *Marshall Field*, 143 U.S. at 683. Petitioner does not appear to dispute this "[l]ong settled and established practice." *The Pocket Veto Case*, 279 U.S. 655, 689 (1929).

Petitioner cites (Br. 25) *Marshall Field* and *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1 (1825), for the

proposition that Congress cannot delegate "legislative" power. But all agree that Congress cannot delegate certain "powers which are strictly and exclusively legislative." *Grimaud*, 220 U.S. at 517 (quoting *Wayman*, 23 U.S. (10 Wheat.) at 42-43). It is equally well settled, of course, that Congress may delegate to the Executive discretion to implement its laws. See pp. 15-21, *supra*. The Court has "often * * * recognized" the "difficulty" of "defin[ing]" in the abstract "the line which separates legislative power to make laws, from administrative authority to make regulations." *Grimaud*, 220 U.S. at 517. The Court's decisions have sought to give concrete content to that distinction and provide guidance for distinguishing impermissible delegations of legislative power from permissible delegations of nonlegislative authority.

Invalidating the regulations promulgated pursuant to Section 20913(d) on nondelegation grounds would likely mean that many pre-Act sex offenders who failed to register in the decade after SORNA became applicable to them would escape criminal sanctions, thwarting one of the statute's central aims. Since SORNA's enactment, approximately 4000 offenders have been convicted of federal sex-offender-registry violations.[13] Given that some of those offenders were required to register based on pre-SORNA offenses, invalidating Section 20913(d) now would likely mean that many of those offenders who failed to register would go free.

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[13] See, *e.g.*, Administrative Office of United States Courts, *Federal Judicial Caseload Statistics, Table D-4: U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending March 31, 2018*, http://www.uscourts.gov/file/24423/download. Data for prior years are available at http://www.uscourts.gov/data-table-numbers/d-4.

Moreover, going forward, holding Section 20913(d) unconstitutional would mean that pre-Act offenders would have no federal obligation to register unless and until Congress intervenes, potentially enabling many offenders to travel or relocate to new jurisdictions without registering and without facing federal criminal sanctions for failing to register. Petitioner here was convicted of drugging and raping an 11-year-old girl, and he seeks the freedom to move anywhere in the country without notice to the community.

Nor does petitioner attempt to justify departing from this Court's decisions. He identifies no development since this Court clarified the governing principles decades ago in *J.W. Hampton* and *American Power & Light* that would warrant restricting Congress's ability to entrust discretion in administering federal law to the Executive. Petitioner also "does not, indeed could not, argue that the rule established" in this Court's cases "is 'unworkable.'" *United States* v. *International Bus. Machines Corp.*, 517 U.S. 843, 856 (1996); cf. *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2097-2098 (2018) (holding departure from precedent warranted in light of subsequent developments, precedent's "unworkab[ility]," and lack of legitimate reliance interests).

Indeed, it is petitioner's proposed standard that threatens to be unworkable. He proposes (Br. 22) a rule prohibiting Congress from delegating "the power to enact generally applicable, binding rules of private conduct." But SORNA itself establishes both general rules of private conduct and the penalties for violating them. The critical question is how much discretion Congress can delegate to the Executive to make determinations that in turn affect whether a prospective rule established by statute applies to particular private conduct.

On that question, petitioner does not explain with any specificity what separates a permissible delegation from an impermissible one on his view. If petitioner means to argue that Congress can never confer authority on the Executive to make such determinations, his rule would be at odds with this Court's many decisions to the contrary, see pp. 15-21, 47-51, *supra*, and it would frustrate Congress's ability to enlist the Executive's assistance in dealing with complex and changing problems, see *Mistretta*, 488 U.S. at 372. If instead petitioner means to argue that Congress can delegate authority to make determinations that affect the application of prospective rules, so long as Congress is clear about its general policy, then the only question here is whether SORNA's text and context supply such a policy—and this Court in *Reynolds* correctly recognized that they do.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 2250 provides:

Failure to register

(a) IN GENERAL.—Whoever—

(1) is required to register under the Sex Offender Registration and Notification Act;

(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

(b) INTERNATIONAL TRAVEL REPORTING VIOLATIONS.—Whoever—

(1) is required to register under the Sex Offender Registration and Notification Act (42 U.S.C. 16901 et seq.);[1]

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[1] See References in Text note below.

(2) knowingly fails to provide information required by the Sex Offender Registration and Notification Act relating to intended travel in foreign commerce; and

(3) engages or attempts to engage in the intended travel in foreign commerce;

shall be fined under this title, imprisoned not more than 10 years, or both.

(c) AFFIRMATIVE DEFENSE.—In a prosecution for a violation under subsection (a) or (b), it is an affirmative defense that—

(1) uncontrollable circumstances prevented the individual from complying;

(2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and

(3) the individual complied as soon as such circumstances ceased to exist.

(d) CRIME OF VIOLENCE.—

(1) IN GENERAL.—An individual described in subsection (a) or (b) who commits a crime of violence under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States shall be imprisoned for not less than 5 years and not more than 30 years.

(2) ADDITIONAL PUNISHMENT.—The punishment provided in paragraph (1) shall be in addition and consecutive to the punishment provided for the violation described in subsection (a) or (b).

2. 34 U.S.C. 20901 provides:

Declaration of purpose

In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this chapter establishes a comprehensive national system for the registration of those offenders:

(1) Jacob Wetterling, who was 11 years old, was abducted in 1989 in Minnesota, and remains missing.

(2) Megan Nicole Kanka, who was 7 years old, was abducted, sexually assaulted, and murdered in 1994, in New Jersey.

(3) Pam Lychner, who was 31 years old, was attacked by a career offender in Houston, Texas.

(4) Jetseta Gage, who was 10 years old, was kidnapped, sexually assaulted, and murdered in 2005, in Cedar Rapids, Iowa.

(5) Dru Sjodin, who was 22 years old, was sexually assaulted and murdered in 2003, in North Dakota.

(6) Jessica Lunsford, who was 9 years old, was abducted, sexually assaulted, buried alive, and murdered in 2005, in Homosassa, Florida.

(7) Sarah Lunde, who was 13 years old, was strangled and murdered in 2005, in Ruskin, Florida.

(8) Amie Zyla, who was 8 years old, was sexually assaulted in 1996 by a juvenile offender in Waukesha,

Wisconsin, and has become an advocate for child victims and protection of children from juvenile sex offenders.

(9) Christy Ann Fornoff, who was 13 years old, was abducted, sexually assaulted, and murdered in 1984, in Tempe, Arizona.

(10) Alexandra Nicole Zapp, who was 30 years old, was brutally attacked and murdered in a public restroom by a repeat sex offender in 2002, in Bridgewater, Massachusetts.

(11) Polly Klaas, who was 12 years old, was abducted, sexually assaulted, and murdered in 1993 by a career offender in California.

(12) Jimmy Ryce, who was 9 years old, was kidnapped and murdered in Florida on September 11, 1995.

(13) Carlie Brucia, who was 11 years old, was abducted and murdered in Florida in February, 2004.

(14) Amanda Brown, who was 7 years old, was abducted and murdered in Florida in 1998.

(15) Elizabeth Smart, who was 14 years old, was abducted in Salt Lake City, Utah in June 2002.

(16) Molly Bish, who was 16 years old, was abducted in 2000 while working as a lifeguard in Warren, Massachusetts, where her remains were found 3 years later.

(17) Samantha Runnion, who was 5 years old, was abducted, sexually assaulted, and murdered in California on July 15, 2002.

3. 34 U.S.C. 20911 provides:

Relevant definitions, including Amie Zyla expansion of sex offender definition and expanded inclusion of child predators

In this subchapter the following definitions apply:

(1) Sex offender

The term "sex offender" means an individual who was convicted of a sex offense.

(2) Tier I sex offender

The term "tier I sex offender" means a sex offender other than a tier II or tier III sex offender.

(3) Tier II sex offender

The term "tier II sex offender" means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

(i) sex trafficking (as described in section 1591 of title 18);

(ii) coercion and enticement (as described in section 2422(b) of title 18);

(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a))[1] of title 18;

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[1] So in original. The second closing parenthesis probably should follow "18".

(iv) abusive sexual contact (as described in section 2244 of title 18);

(B) involves—

(i) use of a minor in a sexual performance;

(ii) solicitation of a minor to practice prostitution; or

(iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a tier I sex offender.

(4) Tier III sex offender

The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18); or

(ii) abusive sexual contact (as described in section 2244 of title 18) against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a tier II sex offender.

(5) Amie Zyla expansion of sex offense definition

(A) Generally

Except as limited by subparagraph (B) or (C), the term "sex offense" means—

(i) a criminal offense that has an element involving a sexual act or sexual contact with another;

(ii) a criminal offense that is a specified offense against a minor;

(iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of title 18;

(iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or

(v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

(B) Foreign convictions

A foreign conviction is not a sex offense for the purposes of this subchapter if it was not obtained with sufficient safeguards for fundamental fairness and due process for the accused under guidelines or regulations established under section 20912 of this title.

(C) Offenses involving consensual sexual conduct

An offense involving consensual sexual conduct is not a sex offense for the purposes of this subchapter if the victim was an adult, unless the adult

was under the custodial authority of the offender at the time of the offense, or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.

(6) Criminal offense

The term "criminal offense" means a State, local, tribal, foreign, or military offense (to the extent specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note)) or other criminal offense.

(7) Expansion of definition of "specified offense against a minor" to include all offenses by child predators

The term "specified offense against a minor" means an offense against a minor that involves any of the following:

(A) An offense (unless committed by a parent or guardian) involving kidnapping.

(B) An offense (unless committed by a parent or guardian) involving false imprisonment.

(C) Solicitation to engage in sexual conduct.

(D) Use in a sexual performance.

(E) Solicitation to practice prostitution.

(F) Video voyeurism as described in section 1801 of title 18.

(G) Possession, production, or distribution of child pornography.

(H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.

(I) Any conduct that by its nature is a sex offense against a minor.

(8) Convicted as including certain juvenile adjudications

The term "convicted" or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of title 18), or was an attempt or conspiracy to commit such an offense.

(9) Sex offender registry

The term "sex offender registry" means a registry of sex offenders, and a notification program, maintained by a jurisdiction.

(10) Jurisdiction

The term "jurisdiction" means any of the following:

(A) A State.

(B) The District of Columbia.

(C) The Commonwealth of Puerto Rico.

(D) Guam.

(E) American Samoa.

(F) The Northern Mariana Islands.

(G) The United States Virgin Islands.

(H) To the extent provided and subject to the requirements of section 20929 of this title, a federally recognized Indian tribe.

(11) Student

The term "student" means an individual who enrolls in or attends an educational institution, including (whether public or private) a secondary school, trade or professional school, and institution of higher education.

(12) Employee

The term "employee" includes an individual who is self-employed or works for any other entity, whether compensated or not.

(13) Resides

The term "resides" means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives.

(14) Minor

The term "minor" means an individual who has not attained the age of 18 years.

4. 34 U.S.C. 20912 provides:

Registry requirements for jurisdictions

(a) Jurisdiction to maintain a registry

Each jurisdiction shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of this subchapter.

(b) Guidelines and regulations

The Attorney General shall issue guidelines and regulations to interpret and implement this subchapter.

5. 34 U.S.C. 20913 provides:

Registry requirements for sex offenders

(a) In general

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration

The sex offender shall initially register—

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) Initial registration of sex offenders unable to comply with subsection (b)

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

(e) State penalty for failure to comply

Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

6. 34 U.S.C. 20914 provides:

Information required in registration

(a) Provided by the offender

The sex offender shall provide the following information to the appropriate official for inclusion in the sex offender registry:

(1) The name of the sex offender (including any alias used by the individual).

(2) The Social Security number of the sex offender.

(3) The address of each residence at which the sex offender resides or will reside.

(4) The name and address of any place where the sex offender is an employee or will be an employee.

(5) The name and address of any place where the sex offender is a student or will be a student.

(6) The license plate number and a description of any vehicle owned or operated by the sex offender.

(7) Information relating to intended travel of the sex offender outside the United States, including any anticipated dates and places of departure, arrival, or return, carrier and flight numbers for air travel, destination country and address or other contact information therein, means and purpose of travel, and any other itinerary or other travel-related information required by the Attorney General.

(8) Any other information required by the Attorney General.

(b) Provided by the jurisdiction

The jurisdiction in which the sex offender registers shall ensure that the following information is included in the registry for that sex offender:

(1) A physical description of the sex offender.

(2) The text of the provision of law defining the criminal offense for which the sex offender is registered.

(3) The criminal history of the sex offender, including the date of all arrests and convictions; the status of parole, probation, or supervised release; registration status; and the existence of any outstanding arrest warrants for the sex offender.

(4) A current photograph of the sex offender.

(5) A set of fingerprints and palm prints of the sex offender.

(6) A DNA sample of the sex offender.

(7) A photocopy of a valid driver's license or identification card issued to the sex offender by a jurisdiction.

(8) Any other information required by the Attorney General.

(c) Time and manner

A sex offender shall provide and update information required under subsection (a), including information relating to intended travel outside the United States required under paragraph (7) of that subsection, in conformity with any time and manner requirements prescribed by the Attorney General.

7. 34 U.S.C. 20927 provides:

Failure of jurisdiction to comply

(a) In general

For any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this subchapter shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3750 et seq.).[1]

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[1] See References in Text note below.

(b) State constitutionality

(1) In general

When evaluating whether a jurisdiction has substantially implemented this subchapter, the Attorney General shall consider whether the jurisdiction is unable to substantially implement this subchapter because of a demonstrated inability to implement certain provisions that would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction's highest court.

(2) Efforts

If the circumstances arise under paragraph (1), then the Attorney General and the jurisdiction shall make good faith efforts to accomplish substantial implementation of this subchapter and to reconcile any conflicts between this subchapter and the jurisdiction's constitution. In considering whether compliance with the requirements of this subchapter would likely violate the jurisdiction's constitution or an interpretation thereof by the jurisdiction's highest court, the Attorney General shall consult with the chief executive and chief legal officer of the jurisdiction concerning the jurisdiction's interpretation of the jurisdiction's constitution and rulings thereon by the jurisdiction's highest court.

(3) Alternative procedures

If the jurisdiction is unable to substantially implement this subchapter because of a limitation imposed by the jurisdiction's constitution, the Attorney General may determine that the jurisdiction is in compliance with this chapter if the jurisdiction has made, or

is in the process of implementing[2] reasonable alternative procedures or accommodations, which are consistent with the purposes of this chapter.

(4) Funding reduction

If a jurisdiction does not comply with paragraph (3), then the jurisdiction shall be subject to a funding reduction as specified in subsection (a).

(c) Reallocation

Amounts not allocated under a program referred to in this section to a jurisdiction for failure to substantially implement this subchapter shall be reallocated under that program to jurisdictions that have not failed to substantially implement this subchapter or may be reallocated to a jurisdiction from which they were withheld to be used solely for the purpose of implementing this subchapter.

(d) Rule of construction

The provisions of this subchapter that are cast as directions to jurisdictions or their officials constitute, in relation to States, only conditions required to avoid the reduction of Federal funding under this section.

8. 28 C.F.R. 72.3 (2008) provides:

Applicability of the Sex Offender Registration and Notification Act.

The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including

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[2] So in original. Probably should be followed by a comma.

sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.

Example 1. A sex offender is federally convicted of aggravated sexual abuse under 18 U.S.C. 2241 in 1990 and is released following imprisonment in 2007. The sex offender is subject to the requirements of the Sex Offender Registration and Notification Act and could be held criminally liable under 18 U.S.C. 2250 for failing to register or keep the registration current in any jurisdiction in which the sex offender resides, is an employee, or is a student.

Example 2. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required, but disappears after a couple of years and does not register in any other jurisdiction. Following the enactment of the Sex Offender Registration and Notification Act, the sex offender is found to be living in another state and is arrested there. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in each state in which he resides, and could be held criminally liable under 18 U.S.C. 2250 for the violation because he traveled in interstate commerce.

9. 28 C.F.R. 72.3 provides:

Applicability of the Sex Offender Registration and Notification Act.

The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.

Example 1. A sex offender is federally convicted of aggravated sexual abuse under 18 U.S.C. 2241 in 1990 and is released following imprisonment in 2007. The sex offender is subject to the requirements of the Sex Offender Registration and Notification Act and could be held criminally liable under 18 U.S.C. 2250 for failing to register or keep the registration current in any jurisdiction in which the sex offender resides, is an employee, or is a student.

Example 2. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required but relocates to another state in 2009 and fails to register in the new state of residence. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in any jurisdiction in which he resides, and could be held criminally liable under 18 U.S.C. 2250 for the violation because he traveled in interstate commerce.

No. 17-6086

IN THE

Supreme Court of the United States

HERMAN AVERY GUNDY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

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United States v. Wiltberger,
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Other Authorities

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INTRODUCTION

The Government defends a version of SORNA that Congress never enacted. Nothing in 34 U.S.C. § 20913(d)—or anywhere else in SORNA—directs the Attorney General to make the Act's requirements, including its criminal sanctions, applicable to pre-Act offenders "to the maximum extent feasible," as the Government claims. Brief for the United States ("Gov't Br.") 24. Instead, Congress gave the Attorney General unconstrained "authority to specify" whether and how SORNA applies to those offenders. 34 U.S.C. § 20913(d).

Congress's choice was deliberate. SORNA's application to pre-Act offenders presented Congress with significant and politically sensitive questions. Among other things, retroactive application raised concerns about fairness (since extending the law's reach to pre-Act offenders would impose new burdens based on past convictions); federalism (since the bulk of SORNA's administrative cost would fall on states, many of which objected to wholesale retroactivity); and politics (given the public controversy over sex-offender registration schemes generally).

But instead of making the hard choices for itself, as the Constitution requires, Congress passed them to the Attorney General. Unlike other delegations upheld by this Court, Section 20913(d) does not set forth any standard, criterion, or policy to constrain the Attorney General's decisions. Instead, it allows him to determine, in his discretion, if hundreds of thousands of people will be subject to lifelong registration obligations, backed by criminal punishments. Section 20913(d) therefore violates the Constitution.

* * *

The Government's effort to rescue Section 20913(d) founders at every step.

First, this Court's precedents foreclose the Government's efforts to dilute the intelligible-principle test and to plumb sources external to Section 20913(d) for some unstated intelligible principle that Congress itself did not provide.

Second, even if the Court could consider the Government's sources, they do not show that Congress "intended" or "expected"—much less required—the Attorney General to expand the Act to cover pre-Act offenders "to the maximum extent feasible."

Finally, because Section 20913(d)'s delegation implicates a unique constellation of separation-of-powers concerns, Congress must provide clear and meaningful guidance to constrain the Attorney General. Its failure to do so in Section 20913(d) renders this provision unconstitutional.

ARGUMENT

I. The Court cannot engraft an intelligible principle onto Section 20913(d)'s unambiguously standardless text.

The Government does not dispute that Section 20913(d) contains no explicit directive, policy, standards, or guidance. But it argues that the Court can intuit a purported intelligible principle—an idea of what Congress "wanted" or "expected" the Attorney General to do about pre-Act offenders, Gov't Br. 25, 38—from SORNA's introductory statement of purpose, 34 U.S.C. § 20901; the statute's legislative history; its definition of a "sex offender," 34 U.S.C. § 20911; and language from *Reynolds v. United States*, 565 U.S. 432

(2012). The Government's argument misconceives separation-of-powers requirements and disregards basic principles of statutory interpretation.

A. Congress must state more than a precatory "general policy" to satisfy the intelligible-principle test.

Relying on a passage from *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946), the Government contends that the "only question" for the Court is whether SORNA suggests a "general policy" the Attorney General "should pursue" regarding pre-Act offenders. Gov't Br. 13. The Government is wrong. A "general policy"—precatory and untethered to the delegation—is not enough to state an intelligible principle.

The intelligible-principle test is intended to ensure that Congress has done the "legislative" work—that it has made the critical choices in a law and has left only implementation to the Executive. *See* Brief for Petitioner ("Pet. Br.") 26–27. To that end, (1) Congress itself must "lay down" the guiding principle as a concrete expression of its will, *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)—it cannot be supplied by the Executive or the Judiciary, *see Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); (2) the principle must be expressed in the "legislative act," *J.W. Hampton, Jr.*, 276 U.S. at 409, not lurking dormant in the minds of legislators; (3) the principle must be binding, not merely precatory: the delegate must be "directed to conform" to it, *id.*; and (4) the principle must be sufficiently clear to enable courts "to ascertain whether the will of Congress has been obeyed," *Yakus v. United States*, 321 U.S. 414, 425 (1944).

The Government ignores these requirements and instead propounds a watered-down version of the intelligible-principle test under which Congress need only state a "general policy" for the legislation as a whole, unconnected to the delegation. *See* Gov't Br. 19 (citing *American Power & Light*, 329 U.S. at 105). But the government reads the passage from *American Power & Light* out of context. *American Power & Light* did not offer the cited "general policy" passage as a freestanding sufficient test for a permissible delegation. Rather, after examining the specific guidance provided in that delegation, the Court commented: "Necessity ... fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it *then* becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." 329 U.S. at 105 (emphasis added).

Read properly, the passage applies only when Congress has already supplied a basic intelligible principle, and "[n]ecessity" has fixed a point where it is "unreasonable and impracticable" to require Congress to provide additional "detailed rules." That is why the Court has not adopted this passage as its generally applicable intelligible-principle test. *See, e.g.*, *Whitman*, 531 U.S. at 473–77 (nowhere citing the "general policy" language); *Loving v. United States*, 517 U.S. 748 (1996) (same); *Fahey v. Mallonee*, 332 U.S. 245 (1947) (same).

In any event, Section 20913(d) does not even contain a "general policy." And engrafting one onto that unambiguous provision would be improper, as we now show.

B. Searching beyond Section 20913(d) for an intelligible principle is improper because that provision is unambiguously standardless.

The Government accuses petitioner of ignoring rules of statutory construction by considering Section 20913(d) "in a vacuum." Gov't Br. 31. On the contrary: the Government disregards those rules by seeking to override the plain text of Section 20913(d).

Two rules of construction control. The first is the Court's "cardinal canon": "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (citations omitted). "When the words of a statute are unambiguous ... this first canon is also the last: judicial inquiry is complete." *Id.* (citations omitted). The second rule is that "[a] specific provision controls one of a more general application." *Gozlon–Peretz v. United States*, 498 U.S. 395, 407 (1991) (citation omitted). This is "particularly" true "when the two [provisions] are interrelated and closely positioned, both in fact being parts [of the same statutory scheme]." *HCSC–Laundry v. United States*, 450 U.S. 1, 6 (1981) (per curiam) (citation omitted).

These rules prohibit roaming beyond Section 20913(d) for an intelligible principle because, first, that provision is unambiguous, and, second, it is the specific provision of SORNA that addresses the Attorney General's authority over pre-Act offenders. *See Reynolds*, 565 U.S. at 439–40 (recognizing that Section 20913(d) "specifically deals with a subset (pre-Act offenders)" and "therefore should control the Act's application to that subset") (citations omitted).

Section 20913(d)'s relevant language is plain: "The Attorney General shall have the authority to specify the applicability of the requirements of [SORNA] to [pre-Act] sex offenders ..., and to prescribe rules for the registration of any such sex offenders." 34 U.S.C. § 20913(d). Thus, as the Court held in *Reynolds*, this provision is "naturally read" to permit—but not require—the Attorney General to make SORNA applicable to pre-Act offenders. 565 U.S. at 440.

As a threshold matter, the Government's proffered "feasibility" standard is not in the text. Congress knows how to direct the Executive to take action "to the extent feasible" when that is what it intends. It has done so in countless other statutory provisions. *See, e.g.*, 42 U.S.C. § 1310 (directing Commissioner of Social Security to take certain actions "to the extent feasible and appropriate"); 42 U.S.C. § 1383b(e)(2)(B) (same "to the extent feasible"); 20 U.S.C. § 3509 (directing Secretary of Health and Human Services to coordinate certain programs "to the maximum extent feasible"); 49 U.S.C. § 24201(a)(1) (directing Secretary of Transportation to apply certain project development procedures "to the greatest extent feasible"). No basis therefore exists to read the omitted language into SORNA. *See, e.g., Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 384 (2013) (Congress's "use of explicit language in other statutes cautions against inferring" it when omitted).

Next, the Government concedes that Section 20913(d) is unambiguous. Gov't Br. 51–52. That provision is also unambiguously standardless: it does not inform the Attorney General whether, or when, he should exercise his authority, what action he should take, or what factors to consider. It plainly gives him authority without qualification or guidance. Nor is the

authority simply an "on/off" switch. As the Government and this Court have acknowledged, the provision allows the Attorney General to treat different groups of pre-Act offenders differently and to specify which registration requirements apply. *See* Brief for the United States 24–25, *Reynolds* (No. 10–6549); *Reynolds*, 565 U.S. at 440.

Because Section 20913(d) is unambiguous, engrafting the government's "to the maximum extent feasible" constraint onto that provision would be improper—the Court "cannot supply what Congress has studiously omitted." *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959); *see also Dodd v. United States*, 545 U.S. 353, 359 (2005) (Court is not "free to rewrite the statute that Congress has enacted"); *Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004) (Court will not "read an absent word into the statute"); *United States Dep't of Justice v. Landano*, 508 U.S. 165, 181 (1993) (Court is "not free to engraft" a different "policy choice onto the statute that Congress passed").

An example drives home just how misguided the Government's position is. Suppose the next Attorney General were to promulgate a rule declaring that SORNA does not apply to pre-Act offenders whose convictions predate SORNA's enactment by more than ten years. Suppose further that a party with standing files an action challenging the new rule, arguing that the Attorney General abused his discretion, because it is "feasible" for him to require this group of offenders to register. Such a claim would fail based on the plain terms of Section 20913(d)'s unqualified grant of power to the Attorney General.

C. The delegations previously sanctioned by this Court included explicit textual standards to bind the delegate.

Despite Section 20913(d)'s clear language, the Government asks the Court to rummage elsewhere for an intelligible principle. The Government notes that the Court in other cases has looked to a statute's general purpose, neighboring provisions, or legislative history to determine whether a delegation was constrained by a sufficiently intelligible principle. *See* Gov't Br. at 19–20, 24, 31–32.

The Government overlooks that all of those cases involved a statute in which Congress explicitly provided *some* standard, however general, in the delegation provision itself to guide and cabin the delegate's power. Thus, for example:

- In *National Broadcasting Co. v. United States*, 319 U.S. 190, 225–26 (1943), the statute directed the FCC to regulate broadcast licensing "as public convenience, interest, or necessity requires."
- In *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944), the statute directed the Federal Power Commission to determine "just and reasonable" rates for natural gas sales.
- In *Yakus*, 321 U.S. at 420, the statute directed the Price Administrator to fix commodity prices that would be "fair and equitable" and would "effectuate the purposes" of the statute.
- In *American Power & Light*, 329 U.S. at 105, the statute directed the SEC to prevent corporate structures that were "unduly or unnecessarily complicate[d]" or that "unfairly or inequitably

distribute[d] voting power among security holders."

- In *Fahey v. Mallonee*, 332 U.S. 245, 247, 249 (1947), the statute directed the Federal Home Loan Bank Board to "require an equitable readjustment of the capital structure" of savings and loan institutions.
- In *Lichter v. United States*, 334 U.S. 742, 775–76 (1948), the statute directed the Secretaries of War and Navy to take corrective measures upon determining that "excessive profits" had been realized or were likely to be realized from any contract.

Accordingly, in those cases it was appropriate for the Court to look to other sources to determine whether the generally worded standard—provided expressly by Congress in the delegation provision itself—had a sufficiently intelligible meaning to constrain the delegate.

Section 20913(d) is different. It provides no standard at all for the Attorney General to follow. It contains no criteria, objective, or term of art for the Court to construe. Rather, Section 20913(d), like the provision struck down in *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935), is "brief and unambiguous": it delegates broad rule-making power to the Executive but "does not state whether or in what circumstances or under what conditions" the Executive is to act. *Id.* The provision literally "fail[s] to articulate *any* policy or standard" to guide or confine the Executive's discretion. *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (emphasis added) (describing statutes invalidated in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining*). And neither the Act's general

purposes nor its other provisions "can be deemed to relate to the subject" specifically addressed by Section 20913(d)—the Attorney General's treatment of pre-Act offenders. *Panama Refining Co.*, 293 U.S. at 416. *See also Bloate v. United States*, 559 U.S. 196, 207 (2010) ("[G]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment.") (citation omitted).

"Where there is no ambiguity in the words, there is no room for construction." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95–96 (1820). Thus, because Section 20913(d) plainly gives the Attorney General plenary authority over SORNA's application to pre-Act offenders, it fails even the most permissive formulation of the intelligible-principle test and unconstitutionally delegates legislative power to the Executive.

II. The Government's sources do not reveal any "feasibility" standard in Section 20913(d).

Even if this Court were to stray beyond the unambiguous text of Section 20913(d), the sources relied upon by the Government—this Court's opinion in *Reynolds*, SORNA's preamble, SORNA's definition of a "sex offender," and SORNA's legislative history, Gov't Br. 23–27—do not contain the principle the Government proposes.

A. The Court's decision in *Reynolds*

Contrary to the Government's assertion, *Reynolds* does not "make clear" that SORNA contains an unspoken directive to the Attorney General to register pre-Act offenders "to the maximum extent feasible." Gov't Br. 13. The sole issue in *Reynolds* was whether SORNA's registration requirements applied to pre-Act

offenders before the Attorney General decided that they would. 565 U.S. at 434. The Court said no. *Id.* at 435. In so holding, the Court rejected the Government's argument that SORNA had to be read unnaturally to cover pre-Act offenders of its own force in order to further Congress's purpose of creating "a comprehensive national registration system." *Id.* at 442–45. The Court further rejected the Government's argument that Congress could not have intended to grant the Attorney General authority to leave pre-Act offenders uncovered, as Section 20913(d) plainly allows. *Id.*

The Government here ignores the holding of *Reynolds*. Instead, it seizes upon language in *Reynolds* positing various factors Congress "might" have reasonably considered in deciding to leave the treatment of pre-Act offenders to the Attorney General. The Government's reliance on those remarks fails for at least two reasons.

First, the remarks, by their own terms, are speculative, not descriptive. Each remark is prefaced with a modal verb—"might," "may," or "could"—expressing possibility. *See Reynolds*, 565 U.S. at 440 ("Congress *may well have*" believed that the delegation "resolve[d] ... [certain] practical problems"); *id.* at 440–41 (noting that certain "considerations *might have* warranted different federal registration treatment of pre-Act offenders"); *id.* at 441 ("At least Congress *might well have* so thought."); *id.* ("Congress *might well have* looked for a solution.") (all emphases added). *Reynolds*'s consistent use of these tentative terms proves that the Court was hypothesizing about Congress's possible motivation in enacting Section 20913(d), not offering a definitive reading of the statute or even its legislative history. *E.g.*, W. Strunk

& E. White (with M. Kalman), *The Elements of Style (Illustrated)* 37 (Penguin Press 2005) ("[*C*]*ould*, *may*, [and] *might*" are auxiliary verbs used "for situations involving real uncertainty.").

Second and relatedly, none of these possible motivations are included in the provision or anywhere else in SORNA. As *Whitman* makes clear, an intelligible principle must be set forth in the statute itself: it would be "an exercise of the forbidden legislative authority" to supply "the standard that Congress ha[s] omitted." 531 U.S. 457, 473. Accordingly, the Court's hypotheses about *why* Congress could have thought it desirable to delegate its power, even if accurate, cannot supply the intelligible principle Congress failed to enact into law.

The Government also erroneously relies on the *Reynolds* dissent to claim that Section 20913(d), as written, "is no different for nondelegation purposes" than if Congress had "expressly imposed SORNA's registration requirement on all pre-Act offenders and empowered the Attorney General to make exceptions," except that "such a statute would have established a different default rule . . . ." Gov't Br. 30.

In fact, the *Reynolds* dissent opined that there was a pivotal constitutional difference between these two formulations. Justice Scalia wrote that he would interpret Section 20913(d) "as conferring on the Attorney General an authority to make exceptions to the otherwise applicable registration requirements," in contrast to the Court's interpretation, which empowered the Attorney General to decide if the requirements "would *ever* apply to pre-Act offenders." 565 U.S. at 449 (Scalia, J., joined by Ginsburg, J., dissenting). In the dissent's opinion, the former

interpretation posed no constitutional issue because it was akin to prosecutorial discretion.[1] In contrast, the Court's reading raised constitutional concerns because it permitted the "Attorney General to decide—with no statutory standard whatever governing his discretion—whether a criminal statute will or will not apply to certain individuals." *Id.*

In any event, had Congress written Section 20913(d) completely differently, as the Government suggests it "could" have, Gov't Br. 30—in a way, for example, that clearly expressed a legislative will that all pre-Act offenders be required to register—that would be a different case. But this Court must rule on the constitutionality of the statute Congress actually enacted, not an imaginary one.

B. SORNA's preamble and definition of "sex offender"

Within SORNA's text, the Government points to two provisions it claims establish Section 20913(d)'s intelligible principle: the Act's introductory declaration of purpose and its definition of "sex offender." But neither allows the Court to read into

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[1] It is not clear that an oppositely worded statute would be constitutional. Prosecutorial discretion is not the same as the power to suspend, revoke, or waive a legal obligation. The Government cites no authority for its claim that Congress can grant the Executive complete discretion to exempt groups of individuals from the law. To the contrary, constitutional nondelegation principles also govern the power to waive legal requirements. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 465 (1998) (Scalia, J. concurring in part) (noting Executive reduction of legal requirements can also "usurp[] the nondelegable function of Congress"). And the statutes cited by the Government allowing for exemptions, Gov't Br. 30, all include guidance or criteria directing the exercise of this power.

Section 20913(d) an unstated command requiring the Attorney General to extend SORNA to pre-Act offenders to the maximum extent feasible (or to exercise his discretion in any other particular way).

SORNA's declaration of purpose states that Congress wanted to establish a "comprehensive national system" for the registration of sex offenders. 34 U.S.C. § 20901. But as the Court held in *Reynolds*, SORNA as enacted does not impose a registration requirement on any pre-Act offender. Accordingly, it would be improper to extract from SORNA's general purpose an unstated intention in Section 20913(d)—let alone a binding requirement—that the Attorney General register all pre-Act offenders to the extent feasible. This Court has several times rejected the notion that the prefatory statement of the broad goal of SORNA as a whole overcomes the specific language in later sections defining how "comprehensive" the system should be. *See Nichols v. United States*, 136 S. Ct. 1113, 1118–19 (2016); *Carr v. United States*, 560 U.S. 438, 443, 454–57 (2010); *Reynolds*, 565 U.S. at 442. Moreover, other provisions of SORNA take steps to create a comprehensive national registration system that might or might not include pre-Act offenders. *See* Pet. Br. 47. Had Congress meant by "comprehensive" that all pre-Act offenders should be required to register under SORNA to the extent feasible, it would have said so.

Similarly, it is of no moment that SORNA's definition of "sex offender" broadly includes anyone who "was convicted" of a "sex offense." This at most confirms, as Section 20913(d) states, that Congress wanted the Attorney General to have the option of covering pre-Act offenders. But this definition, like Section 20913(d), does not provide any guidance as to

whether, when, or how the Attorney General should exercise that option.

C. SORNA's legislative history

SORNA's legislative history also does not establish that the Attorney General is bound by some sort of "feasibility" standard. The Government relies on statements from some legislators expressing concern over so-called "missing" offenders. *See* Gov't Br. 6, 24. But even they did not say that the Attorney General is supposed to register the entire class of pre-Act offenders "to the maximum extent feasible."

* * *

In sum, the Government's "feasibility" standard does not come from *Reynolds*, SORNA's text, or its legislative history.

Nor does it match the intelligible principles courts of appeals have read into Section 20913(d). For example, the Eleventh Circuit held that the provision "suggest[s]" the Attorney General require pre-Act offenders "to register to the extent that he determines it would contribute to the protection of the public and the comprehensiveness of a national sex offender registry." *United States v. Ambert*, 561 F.3d 1202, 1214 (11th Cir. 2009).

The Government's "feasibility" standard does not even match the Attorney General's actions pursuant to this delegation. For his part, the Attorney General described Section 20913(d) as granting him the ability to apply SORNA to pre-Act offenders "if he determines ... that the public benefits of doing so outweigh any adverse effects." 75 Fed. Reg. 81,850 (Dec. 29, 2010). His individual registration regulation, in turn, simply makes SORNA applicable to "all" pre-Act offenders, 28 C.F.R. § 72.3—it does not account in

any way for practical problems, "feasibility," or even possible costs and adverse effects of retroactivity.

Rather than deriving from any of the identified sources, the Government's "feasibility" standard appears to be invented—an effort to obscure the legislative nature of the power granted the Attorney General. The Court should reject the Government's effort to disguise what Section 20913(d)'s text makes plain: SORNA leaves the crucial policy choices regarding pre-Act offenders to the Attorney General's unbridled discretion, in violation of the Constitution.

III. Section 20913(d)'s delegation requires clear and meaningful legislative guidance because it implicates a unique combination of separation-of-powers concerns.

Section 20913(d)'s standardless delegation would be unconstitutional even if it involved a run-of-the-mill transfer of civil rulemaking power to an administrative agency. But it does not. Nor is this a statute concerning licensing authority, national park lands, military rules, or the conduct of foreign affairs. Pet. Br. 21–22. This is a delegation involving Congress's core legislative power to make generally applicable rules of private conduct and to determine the content and scope of criminal laws. *Id.* 23–24. The delegation also raises retroactivity and federalism concerns. This delegation's unique aspects preclude upholding it based only on some unstated, precatory general policy.

A. The guidance required under the intelligible-principle test depends on the power conferred and the identity of the delegate.

This Court considers the nature and magnitude of the assigned power, along with the identity of the delegate, in determining whether Congress provided sufficient guidance regarding the exercise of that power. *See, e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001); *United States v. Mazurie*, 419 U.S. 544, 556–57 (1975); Pet. Br. 28–30.

The Government is thus wrong to state that petitioner is proposing a "different" test that "depart[s] from the Court's precedent," Gov't Br. 38–39, by asking the Court to weigh these factors in gauging whether Congress has provided sufficient guidance here.

Loving v. United States and *Mistretta v. United States* confirm that the nature of the assigned power and its recipient's identity influence the degree of guidance this Court requires. In *Loving*, the President's and Congress's shared constitutional authority over the military lessened the need for detailed statutory guidance to the President: the Court ruled "it would be contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority." 517 U.S. 748, 768–72 (1996).

Mistretta v. United States, 488 U.S. 361 (1989), made the same point in upholding the law that established the U.S. Sentencing Commission within the Judicial Branch and gave it power to promulgate guidelines. That measure did not violate the nondelegation doctrine both because Congress

provided extensive guidance, *id.* at 374–77, and because sentencing is "a peculiarly shared responsibility" that "has never been thought of as the exclusive constitutional province of any one Branch," *id.* at 390–91; *see also id.* at 386 (describing sentencing as "twilight area" of shared power between legislature and judiciary). The Court recognized that if Congress had instead transferred this power to the Executive, it would raise the question whether Congress "unconstitutionally had united the power to prosecute and the power to sentence ...." *Id.* at 391 n.17.

Finally on this point, in *Touby v. United States*, 500 U.S. 160, 166 (1991), the Court upheld a delegation to the Attorney General to temporarily schedule controlled substances because Congress provided detailed statutory guidance that "meaningfully contrain[ed]" the Attorney General's exercise of that power. *See* Pet. Br. 35–36. And while that holding obviated the need to settle in *Touby* whether greater guidance is required when "Congress authorizes another branch to promulgate regulations that result in criminal sanctions," 500 U.S. at 165–66, "the Court has repeatedly and long suggested that in the criminal context Congress must provide more 'meaningful guidance' ...," especially for a law that "leav[es] it to the nation's top prosecutor to specify whether and how a federal criminal law should be applied to a class of a half-million individuals." *United States v. Nichols*, 784 F.3d 666, 672 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of reh'g en banc).

B. Given the nature of Section 20913(d)'s delegation, Congress must provide clear and meaningful guidance.

Section 20913(d)'s delegation implicates core separation-of-powers concerns, as petitioner's opening brief described. Pet. Br. 23–41. Because of the nature of this delegated power, Congress must clearly state specific standards that meaningfully constrain the Attorney General. Section 20913(d) does not do so and is therefore unconstitutional.

The Government mistakenly claims that Section 20913(d)'s delegation "does not implicate" criminal law, retroactivity, or federalism issues, *see* Gov't Br. at 39. It does: Section 20913(d) empowers the Attorney General to define the scope and content of both federal and state criminal laws. *See* Pet. Br. 23–25. It authorizes her to decide whether or not a pre-Act offender's failure to register, under terms the Attorney General herself sets (and can change), is a crime at all. In this way, Section 20913(d) grants the Attorney General "power to make ... crimes of acts that never had been such before . . . ." *Fahey v. Mallonee*, 332 U.S. 245, 249 (1947).

And in sharp contrast to *Loving* and *Mistretta*, here the Constitution requires greater congressional guidance given the nature of the delegated power and the identity of the delegate. The power to decide the content and reach of criminal laws is one vested exclusively with the legislature. *See, e.g.*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018); Pet. Br. 19–21; *see also* Amicus Br. of ACLU 10–15 (detailing constitutional provisions and doctrines that render the power to define crimes "constitutionally distinctive"); Amicus Br. of Cato Institute 16–19 ("The imposition of

criminal sanction by executive fiat is one of the tyrannies the Founders most feared."). In this respect, structural separation-of-powers and due process concerns are interrelated—both protect individual liberty by requiring a division between the law maker and the prosecutor.

The Government argues that courts have upheld other assignments of the power to promulgate regulations "that in turn affect" criminal liability, *see* Gov't Br. 45–47, 52, so Section 20913(d) must be constitutional. But this Court has never upheld a delegation remotely like this: a standardless transfer of power to the Attorney General to determine the potential criminal liability of over 500,000 people, in a way that also impacts retroactivity and state sovereignty. The question whether to retroactively impose burdensome lifelong registration requirements on individuals is a far cry from the design of an oleomargarine label, *see* Gov't Br. 47.[2]

The Government next errs in claiming that SORNA "raises no retroactivity concerns," Gov't Br. 39. Whether or not Section 20913's registration requirements violate ex post facto prohibitions—an open question—the law operates retroactively with respect to pre-Act offenders by increasing the burdens on those individuals based exclusively on their past conduct. *See, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269–70 (1994) (defining retroactive law as

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[2] The Government is also mistaken that it is sufficient for Congress to enact a general criminal law and leave it to the Executive to fill in details of the elements of the offense. *See* Gov't Br. 47–48. This Court's void-for-vagueness decisions preclude this sort of delegation to the Executive. Pet. Br. 20–21.

one that "attaches new legal consequences to events completed before its enactment").

For example, a 15-year-old who admitted to a qualifying New York state sex offense in 2005 had no expectation that he would be required to register as a sex offender. But if the Attorney General chooses to extend SORNA to pre-Act offenders, that individual is saddled with registration and reporting requirements that could last his entire life.

Finally, Section 20913(d) implicates federalism concerns because it empowers the Attorney General to impose onerous requirements on individuals convicted of state crimes even if their own state exempts them from registration. Pet. Br. 39–40. Numerous states objected to SORNA's retroactivity, and the vast majority have declined to implement the law. *Id.* 10–12. But SORNA's individual registration mandate, 34 U.S.C. § 20913(a), applies whether or not a state implements SORNA or an offender travels in interstate commerce. In this way, the law encroaches upon the traditional state function of governing intrastate matters.

Nor is this an abstract problem: there is no direct federal registry, meaning that all offenders register with a particular state. SORNA thus forces a state to bear the costs of registering individuals that the state itself—best situated to determine the effective use of its resources—has opted not to require to register. *Cf. Printz v. United States*, 521 U.S. 898, 904 (1997) (recognizing burden on state law-enforcement officers administering federal regulatory scheme).

Congress must legislate clearly when it delegates powers affecting these constitutionally sensitive areas. *See* Pet. Br. 28–30. For this reason, even if an

implicit or merely precatory general policy could suffice as an intelligible principle for an ordinary delegation, it is insufficient to save Section 20913(d). Upholding this provision based on some unstated sentiment would contradict the very premise of the nondelegation doctrine, which requires Congress to make critical legislative decisions and be accountable for them to the public.

* * *

In enacting SORNA, Congress faced a clear, if politically contentious, choice about whether and how the Act should apply to previously convicted offenders—and it decided not to decide. "It is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically divisive." *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring). For the reasons detailed above, the Court should hold this delegation unconstitutional.

Nor will a decision in petitioner's favor disrupt sex-offender registration, as the Government suggests, Gov't Br. 54–55. Every state has its own registration system, each of which existed before, and will continue to exist regardless of, SORNA. State offenders convicted before 2006, including petitioner, will still be required to register under these preexisting state laws. And if Congress wishes to require all or some pre-Act offenders to register under SORNA, it can pass a statute saying so.

Section 20913(d)'s complete lack of guidance, coupled with the provision's criminal, retroactive, and antifederalist effects, renders this an invalid transfer of legislative power to the Executive. This is not a case

that requires the Court to fix a precise line between legislating and merely implementing—wherever that line falls, Section 20913(d) is on the wrong side.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

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No. 17-6086

IN THE

Supreme Court of the United States

HERMAN AVERY GUNDY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Jerry L. Mashaw, *Greed, Chaos, and Governance* (1997) 9

Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. Econ. & Org. 81 (1981) 9

Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 Cardozo L. Rev. 775 (1999) 9

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Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989 (2006) 3, 15

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INTEREST OF *AMICUS*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization of approximately 1.6 million members dedicated to the principles of liberty and equality embedded in the United States Constitution. In the nearly 100 years since its founding, the ACLU has appeared in myriad cases before this Court, both as merits counsel and as an *amicus curiae*, to defend constitutional rights. This includes numerous cases in which the ACLU has urged this Court to ensure that the criminal justice system is administered in accordance with constitutional principles, such as *Mapp v. Ohio*, 367 U.S. 643 (1961); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Terry v. Ohio*, 392 U.S. 1 (1968); *Furman v. Georgia*, 408 U.S. 238 (1972); and *City of Chicago v. Morales*, 527 U.S. 41 (1999).

Because this case involves a substantial question bearing on the constitutional administration of the criminal justice system, its proper resolution is a matter of significant concern to the ACLU and its members.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief and their indications of consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

This case asks whether Congress can constitutionally delegate to the Attorney General, the nation's chief prosecutor, both unfettered authority to impose a criminal prohibition in the first place and the power to prosecute violations of the prohibition he has imposed. To do so, as Congress has done here, violates the separation of powers, as reflected in the nondelegation doctrine.

The Framers of our Constitution—all too aware of the threats posed by concentrated power—chose to divide authority among three independent branches of government. That design, this Court has repeatedly emphasized, "serves not only to make Government accountable but also to secure individual liberty." *Boumediene v. Bush*, 553 U.S. 723, 742 (2008).

The Framers assigned the authority to make law to Congress, while giving to the executive branch the power to enforce and apply the law. If Congress delegates its lawmaking authority to the executive branch without sufficient guidance, it violates the nondelegation doctrine. The Court has recognized, however, that the complexity and scope of a national government requires that Congress have leeway to delegate broadly in the administrative setting to agencies that have the expertise, experience, and bandwidth to translate general policies into detailed rules. Thus, so long as Congress provides an "intelligible principle" to guide administrative agencies, the nondelegation doctrine is satisfied. No other approach is practicable or constitutionally required.

But all delegations are not created equal. The same deferential approach is not appropriate when Congress delegates authority to the Attorney General to make criminal law. In the civil administrative setting, for example, this Court has deemed a delegation to the Federal Communications Commission to regulate the airwaves "in the public interest" a sufficiently "intelligible principle." *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943). But it is inconceivable that Congress could authorize the Attorney General to adopt rules defining criminal conduct "in the public interest." The "intelligible principle" requirement must be applied in a more exacting way when the Attorney General, the nation's prosecutor, is delegated authority to define criminal conduct.

This conclusion is supported by the special solicitude the Constitution shows toward restrictions on the criminal power more generally. The Framers' concern with the threats to liberty associated with criminal punishment was a key motivation in their adoption of divided government. *See The Federalist* No. 47, p. 303 (C. Rossiter ed. 1961) (James Madison) ("'When the legislative and executive powers are united in the same person or body,' says [Montesquieu], 'there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner.'"); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1011-20 (2006) (noting that the Framers understood the crucial liberty-protecting function of the separation of powers and that, "in the context of criminal law, no other mechanism provides a substitute," *id.* at 1031).

The power to punish is constitutionally distinctive. This fact is reflected in the many guarantees of the Fourth, Fifth, Sixth, and Eighth Amendments that restrict governmental power either only or with greater force in criminal cases. It is reflected in a range of basic doctrines, from the rule of lenity to the void-for-vagueness principle. And it is manifest in the constitutional prohibitions on *ex post facto* laws and bills of attainder.

In order to harmonize the nondelegation doctrine with the Court's constitutional criminal jurisprudence, therefore, the Court should make clear that, like the guarantees of the Fourth, Fifth, Sixth, and Eighth Amendments, the rule of lenity, and the void-for-vagueness doctrine, among others, nondelegation principles demand more stringent application in criminal settings—particularly where, as here, the same official is delegated the power to determine *whether* criminal law should apply and to prosecute violators of that law.

The Sex Offender Registration and Notification Act (SORNA) fails the heightened nondelegation requirements applicable in the criminal setting. SORNA authorizes the Attorney General to determine whether and how the statute's registration requirements, backed by criminal sanctions, apply to sex offenders convicted before the statute was enacted, and to prosecute those who fail to abide by the obligations the Attorney General has imposed. 34 U.S.C. § 20913(d). And it does so without providing meaningful guidance as to how the Attorney General should exercise that delegated authority. As the government has conceded, the Attorney General could impose criminally enforced

requirements on all, some, or none of those previously convicted, and the statute offers no direction as to how to choose between the options.

SORNA's open-ended delegation to the Attorney General of the power to decide whether conduct is, or is not, a crime and to prosecute those who violate the law is a potent threat to liberty. Without much clearer guidance from Congress, such a delegation is unconstitutional.

ARGUMENT

I. SPECIAL NONDELEGATION CONCERNS ARE RAISED WHERE CONGRESS DELEGATES TO THE ATTORNEY GENERAL, THE NATION'S PROSECUTOR, UNGUIDED DISCRETION TO DEFINE WHETHER CRIMINAL LAW APPLIES IN THE FIRST PLACE.

The nondelegation doctrine serves the separation of powers by requiring Congress to provide an "intelligible principle" to guide administrative rulemaking and regulation. At the same time, the Court has acknowledged that substantial delegation is necessary in the modern administrative state, and has therefore rarely invalidated statutes on this ground. But where Congress seeks to delegate criminal lawmaking authority to the Attorney General, the nation's chief prosecutor, concerns for liberty are heightened, and the justifications for a broad approach to delegation to administrative agencies are generally inapplicable. Thus, the nondelegation doctrine should require greater precision where, as here,

Congress seeks to authorize the Attorney General to impose criminal prohibitions in the first place.

A. Broad Delegation is Generally Permissible in the Administrative Setting, So Long As Congress Provides an Intelligible Principle.

"Even before the birth of this country, separation of powers was known to be a defense against tyranny." *Loving v. United States*, 517 U.S. 748, 756 (1996). That is why "[t]his Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). As Justice Jackson reminded us, "the Constitution diffuses power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see also Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.").

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. Rooted in the principle of separation of powers, the nondelegation doctrine has long "mandate[d] that Congress generally cannot delegate its legislative power to another Branch." *Mistretta*, 488 U.S. at 372; *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892). "Legislative power, as distinguished

from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions." *Buckley v. Valeo*, 424 U.S. 1, 139 (1976) (citation and internal quotation marks omitted); *see also United States v. Evans*, 333 U.S. 483, 486 (1948) ("[D]efining crimes and fixing penalties are legislative . . . functions.").

The Court has recognized, however, that the nondelegation doctrine does not prevent Congress from legislating broadly and delegating significant policy judgment to executive rulemaking in the administrative context. In the administrative setting, as long as Congress lays down "an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform," no nondelegation problem exists. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); *see also Mistretta*, 488 U.S. at 372-73 (the doctrine is satisfied when a statute "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority" (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

In the ninety years since this Court first articulated the "intelligible principle" requirement, it has broadly construed Congress's ability to delegate power in the administrative sphere, striking down only two statutes on nondelegation grounds. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

In the administrative setting, the Court has accepted as sufficiently ascertainable broad standards such as "in the public interest." *See Nat'l Broad. Co.*, 319 U.S. at 225-26 (upholding statute authorizing the FCC to regulate broadcast licensing "in the public interest"); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24-25 (1932) (upholding the Transportation Act's empowerment of the Interstate Commerce Commission to authorize acquisition of one carrier by another if in the "public interest"); *see also Lichter v. United States*, 334 U.S. 742, 774-86 (1948) (upholding statute granting authority to recover "excessive profits" earned on military contracts).

"The judicial approval accorded these 'broad' standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems." *Am. Power & Light Co.*, 329 U.S. at 105. The Court has acknowledged that broad administrative delegations are both necessary and inevitable:

> The legislative process would frequently bog down if Congress were constitutionally required to appraise before-hand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency

> which is to apply it, and the boundaries of this delegated authority.

Id. In the administrative setting, the Court has warned, "if Congress were under the constitutional compulsion of filling in the details beyond the liberal prescription [of the intelligible principle standard,] . . . the burdens of minutiae would be apt to clog the administration of the law and deprive the agency of that flexibility and dispatch which are its salient virtues." *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940).

Broad delegation in the administrative domain serves to promote democracy, accountability, and public responsiveness. Jerry L. Mashaw, *Greed, Chaos, and Governance* 152-56 (1997); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. Econ. & Org. 81, 95-99 (1981); *see also* David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 Geo. L.J. 97, 131-42 (2000); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 Cardozo L. Rev. 775, 781-82 (1999). The nondelegation doctrine thus does not—and should not—prohibit a robust administrative state.

B. The Nondelegaton Doctrine Demands More Specific Legislative Guidance in the Criminal Context.

All delegations, however, are not created equal. Heightened concerns are raised in the criminal context when prosecutors acquire the power to both make and prosecute the criminal law. Moreover, the justifications for broad delegation in

the administrative setting are generally inapplicable to the criminal domain.

The power to define crimes is constitutionally distinctive. The Constitution recognizes its special nature throughout and attaches numerous special restrictions to the exercise of criminal powers.

1. The Constitution expressly prohibits the passage of *ex post facto* laws and bills of attainder. *See* U.S. Const. art. I, §§ 9 & 10. Both prohibitions applied to the States at a time when the Constitution generally applied its individual liberty protections only to the federal government. *See* U.S. Const. art. I, § 10. Like the nondelegation doctrine, the Bill of Attainder Clause reinforces separation-of-powers principles: "The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended . . . as an implementation of the separation of powers . . . ." *United States v. Brown*, 381 U.S. 437, 442 (1965); *see also Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 468 (1977) (a bill of attainder "legislatively determines guilt and inflicts punishment"). "The linking of bills of attainder and ex post facto laws," in Article I, sections 9 and 10 of the Constitution, "is explained by the fact that a legislative denunciation and condemnation of an individual often acted to impose retroactive punishment." *Nixon*, 433 U.S. at 468 n.30. As Alexander Hamilton observed, "[t]he creation of crimes after the commission of the fact . . . and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny." *The Federalist* No. 84, p. 511-12 (C. Rossiter ed. 1961).

2. Four of the first ten amendments address criminal process. Virtually all of the numerous guarantees of the Fourth, Fifth, Sixth, and Eighth Amendments restrict government power either exclusively or with greater force in criminal cases.

a. The Fourth Amendment, for example, requires the exclusionary rule only in criminal cases. *Compare Mapp*, 367 U.S. 643 (applying the exclusionary rule to a criminal trial), *with United States v. Janis*, 428 U.S. 433 (1976) (declining to extend the exclusionary rule to a civil tax proceeding), *and INS v. Lopez-Mendoza*, 468 U.S. 1032, 1040-50 (1984) (declining to apply the exclusionary rule to civil deportation hearings). Similarly, the administrative search exception to the Fourth Amendment recognizes that where a government search serves "special needs, *beyond the normal need for law enforcement*," the warrant and probable cause requirements need not apply. *O'Connor v. Ortega*, 480 U.S. 709, 720 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)) (emphasis added). By contrast, where ordinary criminal law enforcement is involved, those requirements presumptively govern. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

b. The Fifth Amendment's due process guarantee demands a higher standard of proof in criminal cases—namely, proof beyond a reasonable doubt—than the preponderance standard generally sufficient in the civil context. *Compare In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against

conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."), *with United States v. Regan*, 232 U.S. 37, 47-48 (1914) (civil cases generally require proof under preponderance standard), *and Addington v. Texas*, 441 U.S. 418, 427-31 (1979) (reasonable doubt standard not applicable in civil commitment proceeding).

c. The Sixth and Fourteenth Amendments guarantee a jury trial in non-petty criminal cases in federal and state courts. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed"); *Duncan v. Louisiana*, 391 U.S. 145 (1968). Article III likewise guarantees a jury trial in criminal but not civil cases. U.S. Const. art. III, § 2 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury"). The Sixth Amendment also provides a set of additional rights to criminal defendants: a speedy and public trial, notice of criminal charges, confrontation, and assistance of counsel. U.S. Const. amend. VI. By contrast, in civil cases, the Seventh Amendment provides a more limited guarantee of jury trial, and none of the Sixth Amendment's other criminal trial rights. U.S. Const. amend. VII; *see also Walker v. Sauvinet*, 92 U.S. (2 Otto) 90 (1875).

d. The Eighth Amendment limits the power of the legislature to punish by forbidding the imposition of excessive bail or cruel and unusual punishments. U.S. Const. amend. VIII; *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

3. The exceptional nature of the power to define crimes is likewise reflected in the rule of lenity, which directs courts to construe ambiguity in criminal statutes in favor of the defendant. *See Cleveland v. United States*, 531 U.S. 12, 25 (2000); *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Bell v. United States*, 349 U.S. 81, 83-84 (1955). The rule of lenity, which does not apply in the civil setting, reinforces the separation of powers: "Application of the rule of lenity . . . strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985).

4. The heightened demands of the void-for-vagueness doctrine in the criminal arena also underscore the distinctive character of criminal law, and the more stringent requirements of the separation of powers in that realm. *See Johnson v. United States*, 135 S. Ct. 2551, 2556-57 (2015); *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983); *see also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) (noting that the Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe"). As this Court recently explained, the void-for-vagueness doctrine "is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) (opinion of Kagan, J. for a plurality of the Court with Gorsuch, J. concurring in part and concurring in judgment). This doctrine ensures that the legislature, not prosecutors or courts, determine

the scope of the criminal law. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis . . . ."); *see also Kolender*, 461 U.S. at 358 n.7 ("[I]f the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained . . . [this would] substitute the judicial for the legislative department of government." (citation and internal quotation marks omitted)).

5. That the separation of powers places sharper limits on executive rulemaking in the criminal sphere is also reflected in this Court's jurisprudence under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Court routinely extends *Chevron* deference to executive branch agencies in the administrative context. But it has not applied that doctrine to executive branch interpretations of criminal statutes. *See United States v. Apel*, 134 S. Ct. 1144, 1151 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference."); *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014). That decision, too, underscores the Constitution's special commitment of the power to define crimes to Congress, not the executive branch.

6. This Court has also more generally required stringent division of the separation of powers in the criminal arena. *See, e.g., United States v. Bass*, 404 U.S. 336, 348 (1971) ("[B]ecause of the seriousness of criminal penalties, and because

criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity."); *Brown*, 381 U.S. at 442 (constitutional prohibition against bills of attainder reinforces prohibition on trial by legislature); *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812) (federal courts have no authority to exercise common law jurisdiction in criminal cases).

Moreover, the justifications for the liberal "intelligible principle" standard for administrative action are generally inapplicable in the criminal context. *See* Barkow, *supra*, at 989-97, 1011-34 (contrasting justifications for delegations in administrative and criminal domains). No vast or complex set of questions necessitating agency flexibility attends, for example, the yes-or-no decision of whether to apply SORNA to prior offenders—unlike, for example, the myriad issues raised in complex regulatory arenas from securities to environmental to electricity regulation. Instead, a basic judgment about balancing liberty and safety is paramount: the sort of judgment the Framers directed the legislature to make.

To harmonize the nondelegation doctrine with all of the above rules, the "intelligible principle" standard should be applied in more exacting fashion where, as here, a prosecutor is afforded discretion to determine whether criminally backed obligations will be imposed on particular persons or conduct. It would be constitutionally unfathomable for a statute to delegate to the Attorney General the power to impose criminal prohibitions "in the public interest" in the open-ended manner this Court has permitted

with regard to the delegation of civil administrative powers. *See, e.g., N.Y. Cent. Sec. Corp.*, 287 U.S. at 24-25; *Nat'l Broad. Co.*, 319 U.S. at 225-26. *Cf. United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) (a statute criminalizing "acts detrimental to the public interest" would be void for vagueness).[2]

In sum, separation-of-powers principles have special purchase in the context of the criminal law, where unique deprivations of life and liberty are at stake. This Court previously reserved the question of whether, in keeping with these principles, the nondelegation doctrine requires greater specificity in the criminal context. *Touby v. United States*, 500 U.S. 160, 165-66 (1991) (comparing *Fahey v. Mallonee*, 332 U.S. 245, 249-50 (1947), with *Yakus v. United States*, 321 U.S. 414, 423-27 (1944), and *United States v. Grimaud*, 220 U.S. 506, 518, 521 (1911)). It should now bring the nondelegation doctrine into line with the numerous other constitutional protections and doctrines that apply with special force in the criminal context and make clear that the nondelegation doctrine requires more precise legislative guidance in the criminal arena.

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[2] The requirement of greater clarity in the criminal context should apply with even greater force where, as here, Congress authorizes the Attorney General to impose retroactive obligations on individuals for conduct that occurred before the statute was enacted.

II. SORNA'S DELEGATION TO THE ATTORNEY GENERAL TO DECIDE WHO IS RETROACTIVELY SUBJECT TO ITS CRIMINAL OBLIGATIONS VIOLATES THE NONDELEGATION DOCTRINE.

SORNA authorizes the Attorney General to impose criminally backed obligations retroactively on sex offenders, without adequate guidance as to how he is to decide who should be covered, to what extent they should be covered, or for how long they should be covered. Over the years, the Attorney General has on several occasions changed the scope of SORNA's retroactive application—without any guidance or direction from Congress. Because the Attorney General also prosecutes those who violate SORNA's prescriptions, this open-ended delegation raises heightened separation-of-powers concerns—and therefore requires that Congress provide clear guidance to inform and channel the Attorney General's application of the law. Yet SORNA provides little or no guidance, and therefore violates the heightened demands of the nondelegation doctrine in the criminal sphere.

SORNA provides that anyone required to register under the Act who knowingly fails to do so, or who fails to update his or her registration after traveling in foreign or interstate commerce, is guilty of a federal crime. 18 U.S.C. § 2250(a). Congress provided that these obligations would apply to all persons convicted of a sex offense *after* the law was enacted. But Congress could not agree on whether and to what extent the law should apply retroactively, so it punted on that question, and left its resolution to the Attorney General. *See* 34 U.S.C.

§ 20913(d). The Act states: "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction . . . ." *Id.*

In doing so, Congress delegated a core legislative judgment—who is subject to criminally backed obligations—to the Attorney General, who is simultaneously responsible for prosecuting violations of SORNA's registration requirements.[3] As this Court has noted, subsection (d) is "naturally read as conferring the authority to *apply* the Act." *Reynolds v. United States*, 565 U.S. 432, 440 (2012); *id.* at 445. But Congress failed to satisfy the heightened demands of the nondelegation doctrine in the criminal context.

As then-Judge Gorsuch has noted, "[i]f the separation of powers means anything, it must mean that the prosecutor isn't allowed to define the crimes he gets to enforce." *United States v. Nichols*, 784 F.3d 666, 668 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc). Yet, he continued, "that's precisely the arrangement [SORNA] purports to allow in this case and a great many more like it." *Id.*

Amicus does not address whether SORNA would satisfy the forgiving "intelligible principle" standard applicable in the administrative context. Nor need this Court do so. Whether SORNA would

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[3] 28 U.S.C. § 547 provides that the United States Attorneys, who serve at the direction of the United States Attorney General, shall prosecute all offenses against the United States, except as otherwise provided by law.

provide sufficient guidance for a purely administrative scheme with no criminal consequences, it plainly does not satisfy the more exacting standard that appropriately governs delegation of lawmaking authority to the Attorney General in a criminal context. SORNA provides no guidance whatsoever to the Attorney General in deciding whether its criminally backed registration requirements should apply to prior offenders—nor any standards by which this Court could ascertain whether in doing so he had obeyed the will of Congress.

With regard to *future* offenders, SORNA provides an extraordinary level of detail. It creates three tiers of offenders, based on the seriousness of the offense, and specifies which offenses fall into each. 34 U.S.C. § 20911. It specifies in detail what information those offenders must provide for inclusion in the sex offender registry. *Id.* § 20914(a). It sets the period of time offenders in each tier must register: 15 years for tier I offenders, 25 years for tier II offenders, and life for tier III offenders. *Id.* § 20915(a). The statute then provides, in detail, what sorts of conditions merit a reduction in the full registration period for tiers I and III, including successfully completing a period of probation or a sex offender treatment program. *Id.* § 20915(b). And it specifies the number of years that a clean record must be maintained and the amount that the full registration period shall be reduced in each circumstance. *Id.*

By contrast, Congress made no decisions about the applicability of the Act to *prior* offenders, and instead simply delegated that decision entirely to the

Attorney General. Under this broad delegation, the Attorney General is free to do nearly anything he chooses with respect to the more than 500,000 prior offenders—from subjecting all of them to the Act in full to, as the government has conceded, applying the Act to none of them. *See* Br. for the United States at 23-24, *Reynolds*, 565 U.S. 432 (SORNA "does not require [the Attorney General] to act at all."). He might also choose to apply *some* of the Act's requirements to *some* previous sex offenders. But the Act provides no principles to guide the Attorney General in making that decision.

As then-Judge Gorsuch wrote:

> Without any discernible principle to guide him or her in the statute, the Attorney General could, willy nilly, a) require every single one of the estimated half million sex offenders in the nation to register under SORNA, b) through inaction, leave each of those half million offenders exempt from SORNA, c) do anything in between those two extremes, or d) change his or her mind on this question, making the statute variously prospective and retroactive, as administrative agencies are normally entitled to do when Congress delegates interpretive questions to them.

United States v. Hinckley, 550 F.3d 926, 948 (10th Cir. 2008) (Gorsuch, J., concurring), *abrogated by Reynolds*, 565 U.S. 432; *see also, e.g.*, *United States v. Rickett*, 535 Fed. App'x 668, 673 (10th Cir. 2013) ("As written, [subsection (d)] gives the Attorney General

discretion to decide whether and how SORNA should be applied retroactively."); *United States v. Madera*, 528 F.3d 852, 858 (11th Cir. 2008) (noting the Attorney General's "unfettered discretion to determine both *how* and *whether* SORNA was to be retroactively applied").

The lack of guidance provided in SORNA stands in stark contrast to the Controlled Substances Act, the only other statute this Court has reviewed under the nondelegation doctrine that delegated the power to impose a criminal prohibition to the Attorney General. *See Touby*, 500 U.S. at 162-68. That statute, like this one, authorized the Attorney General to decide the scope of criminally backed obligations, but it did so with markedly more statutory guidance.

The *Touby* Court explained that the Controlled Substances Act required the Attorney General, before scheduling a drug temporarily, to find that doing so is "necessary to avoid an imminent hazard to the public safety." 21 U.S.C. § 811(h)(1). In making that determination, it further required him to consider three factors: the drug's "history and current pattern of abuse"; "[t]he scope, duration, and significance of abuse"; and "[w]hat, if any, risk there is to the public health." 21 U.S.C. §§ 811(c)(4)-(6), 811(h)(3). Included within those factors were three *additional* statutorily prescribed considerations: "actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution." 21 U.S.C. § 811(h)(3). The Act also required the Attorney General to publish a 30-day notice of the proposed scheduling in the Federal Register, transmit the notice to the

Secretary of HHS, and "take into consideration any comments submitted by the Secretary in response." 21 U.S.C. §§ 811(h)(1), 811(h)(4).

"In addition to satisfying the numerous requirements of [§ 811(h)]" noted above, the Attorney General must "find that [the drug] 'has a high potential for abuse,' that it 'has no currently accepted medical use in treatment in the United States,' and that '[t]here is a lack of accepted safety for use of the drug . . . under medical supervision.'" *Touby*, 500 U.S. at 167 (quoting 21 U.S.C. § 812(b)(1)). The level of detail the Court thus found sufficient in *Touby* is worlds apart from the broad principles it has deemed sufficiently "intelligible" in administrative cases. *See, e.g., N.Y. Cent. Sec. Corp.*, 287 U.S. at 24-25. SORNA contains nothing even arguably akin to the Controlled Substances Act's level of detail or guidance.[4]

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[4] The Court has occasionally upheld delegations to administrative agencies to impose rules to which criminal sanctions attached, but none of these cases involved delegations to the Attorney General. *See Yakus*, 321 U.S. 414; *Grimaud*, 220 U.S. 506; *Mistretta*, 488 U.S. 361.

Each of these cases, moreover, involved the implementation of detailed administrative schemes—concerning, respectively, an emergency wartime measure allowing the agency to set maximum prices of commodities and rents, *Yakus*, 321 U.S. 414; *id.* at 448-51 (J. Roberts, dissenting), a statute delegating authority to regulate the maintenance of forest reservations and attendant economic activity, *Grimaud*, 220 U.S. at 515-16; and a provision empowering the U.S. Sentencing Commission to promulgate sentencing guidelines, *Mistretta*, 488 U.S. at 371-80. No party argued in these cases that the nondelegation doctrine demanded more precise legislative guidance because of the criminal sanction.

The government has suggested that SORNA provides an "intelligible principle" in its preamble, which provides that the statute's purpose is to create a "comprehensive national system" for registration and to "protect the public from sex offenders and offenders against children." 34 U.S.C. § 20901; *see* Br. of the United States in Opp'n 23-24. But even assuming arguendo that such broad purpose language might satisfy the demands of the nondelegation doctrine in a purely civil administrative setting, it is manifestly insufficient where, as here, Congress has delegated the power to make criminal law to the nation's prosecutor. This language offers no guiding principle as to how the Attorney General should exercise his delegated authority. As noted above, the government has conceded that the Attorney General could do anything from applying the Act retroactively in full to not applying it retroactively to anyone, and

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Each of these cases also involved "precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate." *Mistretta*, 488 U.S at 379; *see also Yakus*, 321 U.S. at 425-26 ("[I]t is irrelevant that Congress might itself have prescribed the maximum prices . . . . [Congress] is free to avoid the rigidity of such a system, which might well result in serious hardship, and to choose instead the flexibility attainable by the use of less restrictive standards."); *Grimaud*, 220 U.S. at 516 ("What might be harmless in one forest might be harmful to another. What might be injurious at one stage of timber growth, or at one season of the year, might not be so at another. In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management."). By contrast, deciding whether to apply the SORNA registration requirements to prior sex offenders involves a simple legislative judgment, not an "intricate, labor-intensive task" calling for "delegation to an expert body."

presumably to anything in between. *See* Br. for the United States at 23-24, *Reynolds*, 565 U.S. 432; Oral Arg. Tr. 31:15-16, *Reynolds*, 565 U.S. 432 (Ms. Sherry for the United States: "[T]he delegation of authority in (d) is . . . plenary"). Where criminal lawmaking is involved, a general policy statement that leaves on the table the full range of options, from inaction to action, does not suffice.

SORNA leaves to the Attorney General's discretion whether failure to adhere to SORNA's registration requirements is or is not a criminal offense for over half a million people. As Justice Scalia remarked at oral argument in *Reynolds*, "I find it very strange to leave it up to the Attorney General whether something will be a crime or not. . . . I mean, especially leave it up to the Attorney General, for Pete's sake; he's the prosecutor." Oral Arg. Tr. 8:4-9, *Reynolds*, 565 U.S. 432; *see also id.* at 6:10-22 (Ginsburg, J.) (noting that a scheme in which "whether it's a criminal offense or not is up to the Attorney General" is "quite different" from one in which he will "implement the technical details").

The wholesale delegation of authority to a single officer to both decide whether a criminal law applies, without any guidance, and to decide whether to prosecute violations of that law, raises the sharpest separation-of-powers and liberty concerns. SORNA violates the heightened requirements the nondelegation doctrine demands in the criminal setting.

CONCLUSION

For the above reasons, the Court should hold that SORNA violates nondelegation principles.

Respectfully submitted,

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No. 17-6086

IN THE

Supreme Court of the United States

HERMAN AVERY GUNDY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF WILLIAM D. ARAIZA AND 14 OTHER CONSTITUTIONAL, CRIMINAL, AND ADMINISTRATIVE LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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A.J. Kritikos, *Resuscitating the Non-Delegation Doctrine: A Compromise and an Experiment*, 82 Mo. L. Rev. 441 (2017) 14

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INTEREST OF AMICI CURIAE[1]

Amici are professors of constitutional, criminal, and administrative law. Many of these amici have written on the issues this case implicates and have devoted significant attention to studying the nondelegation doctrine. They therefore have professional interests in the correct application of nondelegation principles in a criminal case. Amici are troubled by the Sex Offender Registration and Notification Act's exceptionally broad delegation of crime-declaring power to the nation's chief prosecutor. To explain their views on the proper outcome of this case, they respectfully submit this brief as amici curiae. A list of amici appears in Appendix A, reproduced at 1a-4a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Sex Offender Registration and Notification Act (hereinafter "SORNA"), Pub. L. No. 109-248, 120 Stat. 590 (2006), 34 U.S.C. § 20901 *et seq.* (formerly codified at 42 U.S.C. § 16901 *et seq.*), imposes a detailed set of requirements governing the registration and reporting obligations of sex offenders convicted after SORNA's enactment date. It also authorizes the imposition of registration and reporting obligations on offenders convicted *before* that date (persons this

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[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, amici state that no counsel for a party authored this brief in w'hole or in part, and no party, counsel for a party, or any person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

brief refers to as "pre-Act offenders"). However, it provides no guidance for determining under what circumstances or even whether any of the obligations imposed on post-Act offenders should also be imposed on pre-Act offenders. Instead, it simply states as follows: "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders." § 20913(d).

Simply put, this provision lacks any principle—let alone an intelligible one—that would guide the Attorney General's creation of registration and reporting requirements for sex offenders convicted before SORNA's enactment date. So understood, this provision constitutes a rare violation of the nondelegation doctrine. It violates the undemanding requirement that any congressional delegation of authority to an executive branch official must be accompanied by an "intelligible principle" to guide the executive's implementation. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). This unusually broad delegation is not required by the realities of the regulatory problem—here, the need to harmonize disparate state law registration and reporting schemes. Rather, as other parts of SORNA demonstrate, Congress knew well how to provide detailed guidance to the Attorney General when it seeks to accomplish that regulatory goal.

Should this Court conclude that this case does not constitute a rare violation of the Court's long-standing approach to nondelegation issues, it should rule,

narrowly, that the criminal and retroactive nature of the liability the Attorney General is authorized to create justifies more searching nondelegation review of this provision. Amici respectfully suggest that this provision cannot withstand any formulation of such heightened review.

ARGUMENT

This is an exceptional case concerning an exceptional statute. Section 20913(d)—what this brief will refer to as the "pre-Act offender provision"—provides that "[t]he Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter ... and to prescribe rules for the registration of any such sex offenders." That provision thus authorizes the Attorney General—the nation's chief criminal prosecutor—to define a crime, based on past conduct, without even a hint from Congress about the criteria he must employ to do so. It "hand[s] off the job of lawmaking" to a prosecutor who is "free to 'condem[n] all that [he] personally disapprove[s] and for no better reason than [he] disapprove[s] it.'" *Sessions v. Dimaya*, 138 S. Ct. 1204, 1228 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (second alteration in original) (quoting *Jordan v. De George*, 341 U.S. 223, 232, 242 (1951) (Jackson, J., dissenting)). One need not impugn the motives of the Attorney General in wielding this power to recognize its extraordinary breadth.

Even though it is exceptional—indeed, *because* it is exceptional—this case does not require the Court to

make new law in the area of the nondelegation doctrine. The statute in this case fails the long-standing requirement that any federal grant of power to an administrative agency must feature an "intelligible principle." *J.W. Hampton*, 276 U.S. at 409. The pre-Act offender provision contains no principle, let alone an intelligible one, to guide the Attorney General's exercise of delegated power. That alone is enough to render the statute unconstitutional.

But the pre-Act offender provision's delegation is all the more troubling because it grants crime-declaring power to the nation's chief criminal prosecutor and allows him to do so retroactively. This runs afoul of the foundational requirements that, within the federal government, only Congress may declare certain conduct criminal and only Congress may declare when a law will have retroactive effect. These features of the pre-Act offender provision require, at a minimum, that this Court faithfully apply its existing nondelegation precedent. Should the Court believe, however, that this case requires deciding whether "something more than an 'intelligible principle' is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions," *Touby v. United States*, 500 U.S. 160, 165-66 (1991), or regulations with retroactive effect, it should recognize that, whatever additional specificity is required in those narrow circumstances, such specificity does not exist in this case.

I. This Case Can Be Resolved Under Existing Nondelegation Jurisprudence.

For ninety years, this Court has decided nondelegation claims by asking whether the statute in question contains an "intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton*, 276 U.S. at 409; *see also, e.g.*, *Touby*, 500 U.S. at 165 (noting plaintiff's concession that in the statute in question "Congress has set forth ... an 'intelligible principle' to constrain the Attorney General's discretion to schedule controlled substances on a temporary basis"). The intelligible principle test reflects "common sense and the inherent necessities of the governmental co-ordination." *J.W. Hampton*, 276 U.S. at 406. It "does not demand the impossible or the impracticable." *Yakus v. United States*, 321 U.S. 414, 424 (1944). All that the Constitution requires is that the "essentials of the legislative function"—"the determination of ... legislative policy and its formulation and promulgation"—be left to Congress. *Id.* The proper division of labor between Congress and the Executive branch is preserved "when Congress ... specifie[s] the basic conditions of fact upon whose existence or occurrence ... it directs that its statutory command shall be effective," even if it is up to a given "administrative agency" to "ascertain[] from relevant data" when that fact has occurred. *Id.* at 424-25.

To be sure, the Court has found the nondelegation doctrine difficult to apply in practice. There is an admittedly hazy boundary between, on the one hand, delegations that adequately state "an intelligible

principle," *J.W. Hampton*, 276 U.S. at 409, "determin[e] ... legislative policy," *Yakus*, 321 U.S. at 424, or require the agency merely to "fill up the details," *United States v. Grimaud*, 220 U.S. 506, 517 (1911) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)), and, on the other hand, unconstitutional delegations of legislative power. *See, e.g., Grimaud*, 220 U.S. at 517 ("It must be admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations."); *Printz v. United States*, 521 U.S. 898, 927 (1997) ("This Court has not been notably successful in describing the ... line" separating constitutional grants of authority to agencies from unconstitutional delegations of legislative power).

Although this Court has determined that Congress is almost always on the right side of that boundary, here Congress overstepped the bounds of permissible delegation under any understanding of what the "intelligible principle" test requires. Section 20913(d) clearly lacks "an intelligible principle," *J.W. Hampton*, 276 U.S. at 409, fails to "determin[e] ... legislative policy," *Yakus*, 321 U.S. at 424, and in no way can be understood as simply requiring the agency to "fill up the details," *Grimaud*, 220 U.S. at 517 (citation omitted). When looked at in isolation or when compared against other provisions in SORNA, it is readily apparent that the pre-Act offender provision contains no principle to guide the Attorney General. *See infra* § I.A. This lack of any guiding principle in SORNA's pre-Act offender provision distinguishes it from the laws this Court has upheld against nondelegation challenges. *See infra* § I.B. If the nondelegation

doctrine is to retain any meaning, this provision must be struck down.

A. SORNA's pre-Act offender provision lacks any standards.

SORNA's pre-Act offender provision states that "[t]he Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter ... and to prescribe rules for the registration of any such sex offenders." § 20913(d). As construed in *Reynolds v. United States*, 565 U.S. 432 (2012), SORNA's pre-Act offender provision grants exceptional discretion to the Attorney General. The Court's reading of the pre-Act offender provision "leave[s] it to the Attorney General to decide—with no statutory standard whatever governing his discretion—whether a criminal statute will or will not apply to certain individuals." *Id.* at 450 (Scalia, J., dissenting).

This lack of a governing standard is made all the more apparent when measured against other provisions in SORNA, which are quite detailed. Among many other things, SORNA provides detailed rules governing registration requirements. It provides criteria for placing sex offenders into particular offense level categories, § 20911, sets forth the jurisdictions in which they are required to register, § 20913(a), (c), provides the information the offender and the jurisdiction are required to place in the sex offender registry, § 20914(a)-(b), and sets forth the process by which sex offenders are notified of their obligation to register, § 20919. *See also Reynolds*, 565 U.S. at 435

(SORNA "set[s] forth comprehensive registration-system standards"). This level of detail proves that Congress understood how to provide such "comprehensive ... standards" for sex offenders required to register. *Id.*

None of these requirements applies, as a matter of the statute's mandate, to sex offenders convicted before SORNA's enactment date. Nor is the Attorney General provided *any* guidance on how or even whether to impose analogous requirements on such individuals. Instead, under the pre-Act offender provision, the sitting Attorney General enjoys absolute discretion to apply all, none, or some combination of these requirements to pre-Act offenders, without any guidance or constraint from Congress. § 20913(d).[2] *See Reynolds*, 565 U.S. at 440 (Section 20913(d) "is more naturally read as conferring the authority to *apply* [SORNA's registration requirements to pre-Act offenders], not the authority to make exceptions" to requirements that otherwise automatically apply); *id.* at 444-45 (rejecting as "unrealistic" the fear that reading the statute so as to not require pre-Act offenders to register immediately would raise the specter of the Attorney General failing to apply SORNA's registration requirements to those offenders); *id.* at 449 (Scalia, J., dissenting) (dissenting from the majority's

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[2] Indeed, it is arguable that the pre-Act offender provision allows the Attorney General to impose a completely separate registration regime on pre-Act offenders. *See Reynolds*, 565 U.S. at 440-41 ("[P]ractical problems arising when the Act sought to apply the new registration requirements to pre-Act offenders ... might have warranted different federal registration treatment of different categories of pre-Act offenders.").

interpretation, on the ground that the effect of such a reading "is to read the statute as leaving it up to the Attorney General whether the registration requirement would *ever* apply to pre-Act offenders").

To be sure, crafting standards relating to nationwide registration of offenders convicted before SORNA's enactment date raises practical problems given the need to harmonize "a patchwork" of state law registration requirements. *See id.* at 440-41 (recognizing these problems). In light of those difficulties, it might have been understandable for Congress to think that delegating those problems to the Attorney General for resolution might be more efficient than for Congress to resolve them itself. *See id.*

But when Congress encountered this harmonization problem elsewhere in SORNA, it was able to provide the very guidance lacking here. Most notably, when Congress encountered this harmonization problem in the context of evaluating whether a jurisdiction, such as a state, has complied with SORNA, it provided the Attorney General with a detailed substantive and procedural roadmap to follow as he sought to resolve it. When making that evaluation, he is required to determine whether such compliance would violate that jurisdiction's constitution. § 20927(b)(1). In making that determination, he is in turn required to consult with that jurisdiction's chief executive and chief legal officer. § 20927(b)(2). If he determines that such compliance is indeed blocked by the jurisdiction's constitution, he may find the jurisdiction in compliance nevertheless, if that jurisdiction is implementing "reasonable alternative procedures or accommodations." § 20927(b)(3). This level of detail

proves that Congress understood not only how to provide such "comprehensive ... standards" for sex offender registration but also how to guide the Attorney General's discretion in creating the set of harmonized national standards it desired. *See Reynolds*, 565 U.S. at 435 (recognizing the Act's harmonization goal).

Thus, there simply is no excuse for the lack of an analogous roadmap for the executive branch to follow when addressing pre-Act offender concerns. Given Congress's provision of ample guidance in the post-Act offender registration and state compliance contexts, it cannot be said that the pre-Act offender provision's lack of standards is a concession to "common sense and the inherent necessities of the governmental co-ordination." *J.W. Hampton*, 276 U.S. at 406. Indeed, the post-Act offender provisions provide the very criteria and standards that presumably would assist the Attorney General in making analogous determinations for pre-Act offenders. *See, e.g.*, §§ 20911, 20913(a)-(c), 20914(a)-(b), 20915(a) (specifying registration requirements for post-Act offenders based on their offense levels, and specifying the jurisdictions in which registration is required and the content of the registration information). To demand standards for pre-Act offenders analogous to those applied to post-Act offenders is not to "demand the impossible or the impracticable." *Yakus*, 321 U.S. at 424.

Because the pre-Act offender provision itself lacks any standard, there may be some temptation to locate a standard by reading limits into the statute. There is no basis for doing so. First, this Court's decision in *Reynolds* precludes an attempt to read any standards into § 20913(d). To be sure, many decisions upholding

a grant of authority proceed to the nondelegation analysis only after the Court had interpreted the relevant statutory provision so as to provide sufficiently determinate guidance to the agency to satisfy nondelegation review. *See, e.g., Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) ("We agree with the Solicitor General that the text of § 109(b)(1) of the [Clean Air Act] at a minimum requires that [f]or a discrete set of pollutants and based on published air quality criteria that reflect the latest scientific knowledge, [the] EPA must establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air. Requisite, in turn, 'mean[s] sufficient, but not more than necessary.' These limits on the EPA's discretion are strikingly similar to the ones we approved in [*Touby*, 500 U.S. 160]."") (internal citations omitted). In this way, the nondelegation doctrine has often served more as a canon of statutory interpretation rather than as a basis for striking down a statute. *See also Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) ("A construction of the statute that avoids this kind of open-ended grant should certainly be favored.").

In this case, however, *Reynolds* removed the possibility of such a constraining interpretation—for example, one that made SORNA's provisions automatically applicable to pre-Act offenders unless and until the Attorney General acted, or one that made the Attorney General's specification authority applicable "only to those pre-Act sex offenders unable to comply with the statute's 'initial registration' requirements." 565 U.S. at 445 (rejecting both of these alternatives). What remains is a pure, unadorned

grant of standardless discretion to the Attorney General immune to curing by a limiting interpretation. *Cf. id.* at 448, 450 (Scalia, J., dissenting) (observing that the majority's interpretation of § 20913(d) is "sailing close to the wind with regard to the principle that legislative powers are nondelegable").

Second, while it may be tempting, the Court should decline any invitation to find the required standards by "rummag[ing]" around in SORNA's preamble. *United States v. Nichols*, 784 F.3d 666, 674 (10th Cir.) (Gorsuch, J., dissenting from denial of rehearing en banc), *cert. granted in part*, 136 S. Ct. 445 (2015). That provision merely explains that SORNA "establishes a comprehensive national system" to "protect the public from sex offenders and offenders against children." § 20901. It is thus of no help in determining how the Attorney General should proceed in "establish[ing]" such "a comprehensive ... system" to "protect the public." *Id.* More generally, such "rummag[ing]" should be disfavored. Even when statements in statutory preambles point in a single direction, they are not always a reliable guide for what Congress intended or what the statute actually does. "Legislation is the art of compromise and few (if any) statutes pursue a single preambulatory purpose without condition, subtlety, or exception." *Nichols*, 784 F.3d at 675 (Gorsuch, J., dissenting from denial of rehearing *en banc*) (quoting *Rodriguez v. United States*, 480 U.S. 522, 526 (1987)). Of course, when such statements expressly embrace conflicting goals, they provide no meaningful constraint. *Compare Panama Refining Co. v. Ryan*, 293 U.S. 388, 418 (1935) ("Among the numerous and diverse objectives broadly

stated [in the National Industrial Recovery Act's 'Declaration of Policy'], the President was not required to choose."); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935) (noting the "scope" of the "broad declaration" of the policy behind the National Industrial Recovery Act as relevant to the Court's conclusion that the statute gave the President "virtually unfettered" discretion). It is thus unsurprising that the Court has privileged more focused statements of legislative intent over broader, aspirational ones. *See, e.g., Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). Such broader, aspirational goals cannot be used as salves of constitutional stature for statutes that otherwise lack any standards at all.

B. The lack of any standard in SORNA's pre-Act offender provision is fatal under existing precedent.

The lack of standards governing the implementation of § 20913(d) dooms this provision under any approach to nondelegation. Simply put, in the modern era the Court has not confronted a statutory grant of any power to an agency, let alone a grant of power to define crimes, without the shadow of a standard governing how that power is to be wielded.[3] Even the delegation often thought to be among the broadest in the

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[3] *Compare, e.g., Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946) (upholding against a nondelegation challenge § 11(b)(2) of the Public Utility Holding Company Act of 1935, which gave the Securities and Exchange Commission the authority to modify the structure of holding company systems so as to ensure that they are not "unduly or unnecessarily complicate[d]" and do not "unfairly or inequitably distribute

post-*Schechter/Panama Refining* era—the delegation to the Federal Communications Commission to regulate radio airwaves in "the public interest, convenience, or necessity"[4]—was held to incorporate some standard governing the agency's exercise of power. There the Court found within the "public interest" mandate "the interest of the listening public in the larger and more effective use of radio," and on that basis upheld the statute against a nondelegation challenge. *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 216, 226 (1943) (internal quotation omitted); *see also Nichols*, 784 F.3d at 675 (Gorsuch, J., dissenting from

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voting power among security holders"); *Yakus*, 321 U.S. at 420, 423-26 (upholding a wartime conferral of power to an agency to fix the prices of commodities at a level that "will be generally fair and equitable and will effectuate the purposes of th[e] Act."); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943) (upholding a grant of power to the Federal Communications Commission to regulate radio broadcasting in the "public interest"); *New York Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24-25 (1932) (upholding the power of the Interstate Commerce Commission to approve railroad consolidations pursuant to the same "public interest" standard); *Lichter v. United States*, 334 U.S. 742, 785-86 (1948) (upholding delegation to military department secretaries to renegotiate contracts to recover "excessive profits"); *see also Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 558-61 (1976) (finding adequate for nondelegation requirements a mandate that, if the Secretary of the Treasury found that importation of a good in particular quantities under particular conditions threatened the national security, the President was authorized to "adjust" the imports of such article so as to remove the threat, and thus declining to read that mandate narrowly to avoid a nondelegation issue).

[4] *See, e.g.*, A.J. Kritikos, *Resuscitating the Non-Delegation Doctrine: A Compromise and an Experiment*, 82 Mo. L. Rev. 441, 455 (2017) (describing this delegation as "especially broad").

denial of rehearing *en banc*) (describing *Nat'l Broad. Co.* as "perhaps one of the most ambitious uses of the intelligible principle test"). Similarly, the Court has described many post-*Schechter* and post-*Panama Refining* cases as providing analogous levels of guidance that, while broad, still meaningfully constrain the agency's discretion. *See Whitman*, 531 U.S. at 474 (citing examples); *Mistretta v. United States*, 488 U.S. 361, 372-374 (1989). And at times, the Court has been able to interpret an ambiguous provision to provide limiting standards so as to avoid an unconstitutional delegation, *see Am. Petroleum Inst.*, 448 U.S. at 646; *see also supra* § I.A.

In stark contrast, the delegation of authority here plainly lacks any guiding principle—much less an intelligible one—that cabins the Attorney General's exercise of delegated authority. Nor can one be read into the statute. The completely standardless delegation found in SORNA's pre-Act offender provision thus fails any possible articulation of the nondelegation doctrine. If that doctrine "is to retain any force," *Armour v. City of Indianapolis*, 566 U.S. 673, 688, 693 (2012) (Roberts, C.J., dissenting), beyond a mere canon of statutory construction, this Court must find a violation here.

To be sure, unconstitutional delegations have been rare in this nation's history. *See Mistretta*, 488 U.S. at 373. But the fact that such challenges usually fail does not mean the doctrine lacks all force. To put the matter slightly differently, just because the Court's "precedents do not ask for much from government in this area," *see Armour*, 566 U.S. at 693 (Roberts, C.J., dissenting), does not mean they ask for

nothing at all. The Chief Justice made that observation in the analogous context of an Equal Protection Clause challenge arguing that a statutory classification did not bear at least a rational relationship to a legitimate government interest. The subject area of this case—the nondelegation doctrine—is analogous. In both contexts the Court has been hesitant, for the last two generations, to second-guess legislative determinations, whether about the connection between a classification and a legitimate government interest or about the amount of discretion appropriately granted to an executive branch official. But in both cases, the integrity of the underlying legal rule—each of which is fundamental to American constitutionalism—requires that it be enforced in the face of a plain violation.

Likewise, striking down this statute so Congress can supply the required guidance "do[es] not ask for much." *Id.* As then-Judge Gorsuch recognized, Congress could easily have provided such a standard here. *Nichols*, 784 F.3d at 667, 676 (dissenting from denial of rehearing *en banc*). To uphold the statute in the face of this impermissible delegation would mark a departure from the weight of the Court's nondelegation jurisprudence, and it would serve as a statement that there is no longer any limit on Congress's ability to delegate away its legislative power.

It may be the case that striking down the pre-Act offender provision as an unconstitutional delegation will carry some cost because this Court has already determined this provision "efficiently resolves what Congress may well have thought were practical problems arising when the Act sought to apply the new

[sex offender] registration requirements to pre-Act offenders." *Reynolds*, 565 U.S. at 440. But "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." *INS v. Chadha*, 462 U.S. 919, 944 (1983). Rather, as Justice Gorsuch very recently recognized, "[u]nder the Constitution, the adoption of new laws restricting liberty is supposed to be a *hard* business, the product of an open and public debate among a large and diverse number of elected representatives." *Dimaya*, 138 S. Ct. at 1228 (concurring in part and concurring in the judgment) (emphasis added). Given this fundamental truth, the proper course is to strike down the statute.

This case presents the Court with a rare invitation to reaffirm a fundamental, liberty-reinforcing principle of American constitutional law that is otherwise difficult to apply. And it presents an opportunity to do so in a context that does not require this Court to make new nondelegation law and will therefore do exceedingly little to hamstring congressional power or unsettle the Court's acceptance of broad congressional delegations of authority to administrative agencies. The Court should accept that invitation.

II. The Criminal Nature Of The Pre-Act Offender Authority SORNA Grants Renders Its Lack Of Standards Particularly Problematic.

Should this Court conclude that the pre-Act offender provision satisfies the traditional version of the intelligible principle standard, it will necessarily confront the question, avoided in *Touby*, whether certain delegations require more searching review than the traditional "intelligible principle" test.

This Court has recognized that it might be appropriate for a more searching standard to apply in some circumstances. In particular, the Court previously reserved the question whether a more searching standard is required when the authority Congress grants is the power to define crimes. *See Touby*, 500 U.S. at 165-66 (reserving that question).[5] In *Touby*, this

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[5] This question remains unanswered despite the Court upholding the President's power to prescribe aggravating factors for purposes of a military court's decision whether to impose the death penalty. *Loving v. United States*, 517 U.S. 748 (1996). The *Loving* Court relied heavily on the fact that the President possessed significant Article II-based authority in this area through his commander-in-chief power. *See id.* at 772 ("The President's duties as Commander in Chief ... require him to take responsible and continuing action to superintend the military, including the courts-martial. The delegated duty [to prescribe aggravating factors in death penalty cases], then, is interlinked with duties already assigned to the President by express terms of the Constitution, and the same limitations on delegation do not apply where the entity exercising the delegated authority itself possesses independent authority over the subject matter.") (internal quotation marks omitted); *see also id.* at 777-78 (Thomas, J., con-

Court encountered an argument that the unique—and uniquely fraught—authority to deem conduct a crime necessarily means that "something more than an 'intelligible principle' is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions." *Id.* The *Touby* Court expressly reserved that question, as it concluded that the statute in question—which authorizes the Attorney General to place drugs on a schedule of banned substances on a temporary basis—"passes muster *even if* greater congressional specificity is required in the criminal context." *Id.* at 166 (emphasis added).

The Court need not resolve the question whether more searching review is required here because the pre-Act offender provision would not withstand scrutiny under even the traditional "intelligible principle" test. *See supra* § I. But if it concludes that traditional nondelegation doctrine is not sufficient to rule for Petitioner, it should rule for Petitioner on the basis that SORNA involves a uniquely-problematic delegation that cannot survive more searching review.

More searching review is appropriate because, as in *Touby*, the pre-Act offender provision grants the

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curring in the judgment) ("There is abundant authority for according Congress and the President sufficient deference in the regulation of military affairs to uphold the delegation here, and I see no need to resort to our nonmilitary separation-of-powers and 'delegation doctrine' cases in reaching this conclusion. I write separately to explain that by concurring in the judgment in this case, I take no position with respect to Congress' power to delegate authority or otherwise alter the traditional separation of powers outside the military context.").

authority to declare crime. § 20913(d). But the Court can adopt more searching nondelegation review in this case without holding that all delegations in the criminal context are subject to heightened review. The pre-Act offender provision goes beyond a mere grant of power to the nation's chief criminal prosecutor to declare crimes, § 20913(d), because it also authorizes him to base those crimes on conduct that has already occurred. *Id.* Thus, more searching review can be adopted without drawing the fine line that the Court avoided in *Touby*.

Applying a more searching standard—or at least continuing to apply the intelligible principle test meaningfully—in the narrow context of a delegation with criminal and retroactive consequences is consistent with this Court's cases and basic separation of powers principles.

The power to declare crimes is particularly fraught and features prominently in this Court's nondelegation jurisprudence. *See, e.g.*, *Fahey v. Mallonee*, 332 U.S. 245, 249 (1947) (explaining that in both *Panama Refining*, 293 U.S. 388 and *A.L.A. Schechter Poultry Corp.*, 295 U.S. 495, Chief Justice Hughes "emphasized" the fact that those cases "dealt with delegation of a power to make federal crimes of acts that never had been such before"); *Mistretta*, 488 U.S. at 373 n.7 (citing *Fahey*'s discussion); *United States v. Robel*, 389 U.S. 258, 269, 275 (1967) (Brennan, J., concurring in the result) ("The area of permissible indefiniteness [in congressional delegations] narrows ... when the regulation invokes criminal sanctions and potentially affects fundamental

rights ... because the numerous deficiencies connected with vague legislative directives ... are far more serious when liberty and the exercise of fundamental rights are at stake."); *cf. Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 342-43 (1974) (recognizing the nondelegation problems that would arise if a statute was construed as delegating to an agency the power to impose a tax, and for that reason construing an administrative levy as a fee instead). The "awesome and dangerous power[]," *Ginzburg v. United States*, 383 U.S. 463, 477 (1966) (Black, J., dissenting), to impose criminal punishment cannot be triggered without sufficient legislative guidance about whether the particular conduct merits such punishment.

Unfettered discretion for the Executive to declare criminal liability also offends basic notions of separation of powers. Since the beginning of the Republic, the separation of powers has been understood as a critical guarantor of individual liberty. *See, e.g. The Federalist No. 47* at 313 (Madison) (Modern Library, 1941) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny."); *Clinton v. City of New York*, 524 U.S. 417, 449, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers."); Rachael E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 990 (2006) ("It is a familiar premise that the Constitution separates legislative, executive, and judicial power to prevent tyranny and protect liberty.").

That liberty is most at stake in the context of criminal prosecution. *See, e.g.*, Rebecca L. Brown, *Caging the Wolf: Seeking a Constitutional Home for the Independent Counsel*, 83 Minn. L. Rev. 1269, 1274 (1999) ("The combination of legislative power with enforcement power constitutes a very grave affront to the separation of powers, and if carried out in the prosecution of a criminal case, presents the even stronger constitutional objection of threatening individual liberty under procedures that themselves are in contravention of constitutional norms."). It is well-recognized in this Court's jurisprudence that the power of criminal law enforcement is a fraught one that requires careful adherence to constitutional safeguards—not just those reflected in the Bill of Rights, but also the overarching protections provided by the insistence on separating governmental powers. *See Clinton*, 524 U.S. at 450 (Kennedy, J., concurring) ("It would be a grave mistake ... to think a Bill of Rights in Madison's scheme then or in sound constitutional theory now renders separation of powers of lesser importance."); *see also Dimaya*, 138 S. Ct. at 1228 (Gorsuch, J., concurring in part and concurring in the judgment) ("Under the Constitution, the adoption of new laws restricting liberty is supposed to be a *hard* business, the product of an open and public debate among a large and diverse number of elected representatives." (emphasis added)); *Robel*, 389 U.S. at 275 (Brennan, J., concurring in the result). Thus, and as important as the separation of powers is in all contexts of government action, it bears repeating that this is a case whose criminal nature renders that insistence all the more urgent. *See, e.g., United States v. Ward*, 448 U.S. 242, 248 (1980) ("The distinction

between a civil penalty and a criminal penalty is of some constitutional import.").

The intrusion on liberty caused by a regulation with criminal consequences—and the particular separation of powers concerns such intrusions raise—might alone reinforce the need for meaningful nondelegation review. But the need for meaningful review is all the more present here given the retroactive nature of the pre-Act offender provision. Determining a statute's retroactive scope is principally the domain of Congress, such that *Congress* is required to speak clearly when a law is to have retroactive effect. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 268 (1994); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988). This ensures that "Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf*, 511 U.S. at 268. Such careful weighing cannot be guaranteed when Congress delegates that authority to an administrative agency without any guidance about the "statute's proper [retroactive] reach." *See id.* at 280; *Bowen*, 488 U.S at 208-09 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."). In circumstances such as these, a regulation is given retroactive reach without any assurance that such reach was what Congress intended.

At a minimum, these separation of powers considerations mean that this Court should think twice before abandoning its existing restrictions on legislative delegations and reducing its separation of powers

foundations to mere "parchment barriers." *The Federalist No. 48* at 321 (Madison) (Modern Library, 1941). Indeed, to the extent that it might ever make sense to abandon that jurisprudence, it would make bad sense to do so in the context that was of central concern to those Courts originally constructing it. *See Fahey*, 332 U.S. at 249. This case presents a clear violation of a structural safeguard of liberty, and thus a strong argument against the Court using it as the occasion to renege on that promise.

But even if that is not enough, the criminal context of this delegation, infused as it is with retroactive effect, justifies subjecting this delegation to a more searching standard than the traditional rule requires. This Court has not yet had occasion to address what more searching review would look like, *see Touby*, 500 U.S. at 166-67, and there is no need to define the additional limitations that a more meaningful nondelegation review would entail. The utterly barebones nature of the pre-Act offender provision could not survive *any* review that is more searching than the traditional intelligible principle test. Thus, even if this Court determines that the challenged provision somehow survives the intelligible principle test, it should conclude that it must be struck down under the more searching analysis required of delegations of this type.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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No. 17-6086

In the Supreme Court of the United States

HERMAN AVERY GUNDY,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, where Executive Branch action burdens the free exercise of religion, Congress' delegation of power should be strictly construed.

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Burwell v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) 22

Chabad of Key West, Inc. v. *Federal Emergency Management Agency*, No. 4:17-cv-10092-JLK (S.D. Fla., complaint filed Dec. 4, 2017) 24

Dep't of Transp. v. *Ass'n of Am. Railroads*, 135 S. Ct. 1225 (2015) 12

Dr. Bonham's Case, (1610) 77 Eng. Rep. 638 (C.P.) 10

eBay Inc. v. *MercExchange, L.L.C.*, 547 U.S. 388 (2006) 13

Elrod v. *Burns*, 427 U.S. 347 (1976) 13

Epic Systems Corp. v. *Lewis*,
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(May 21, 2018) 12

Gonzales v. *O Centro Espirita*
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546 U.S. 418 (2006). 19, 20, 21

Harvest Family Church v. *Federal*
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Icicle Seafoods, Inc. v. *Worthington*,
475 U.S. 709 (1986) 14

INS v. *Chadha*,
462 U.S. 919 (1983) 9

McAllen Grace Brethren Church v.
Jewell, No. 07-00060 (S.D. Tex. 2016) 23

McAllen Grace Brethren
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764 F.3d 465 (5th Cir. 2014) 23

Miranda v. *Arizona*,
384 U.S. 436 (1966) 13

Perry v. *Sindermann*,
408 U.S. 593 (1972) 13

Rutgers v. *Waddington*
(N.Y. City Mayor's Ct. 1784) 11

Tague v. *Louisiana*,
444 U.S. 469 (1980) 12-13

United States v. *Carolene Prods. Co.*,
304 U.S. 144 (1938) 25

Zubik v. *Burwell*,
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Constitutional Provisions

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Statutes

29 U.S.C. § 1185d 21

42 U.S.C. § 300gg-13 21

42 U.S.C. § 5151 24

42 U.S.C. § 5172 24

Regulations

45 C.F.R. § 147.130 22

76 Fed. Reg. 46,621 (Aug. 3, 2011) 22

77 Fed. Reg. 8,725 (Feb. 15, 2012) 22

82 Fed. Reg. 47,792 (Oct. 13, 2017) 22

83 Fed. Reg. 25,502 (June 1, 2018) 22

Other Authorities

1 William Blackstone, Commentaries
on the Laws of England (1765) 8, 10, 12

Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713 (1985)..... 26

Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated*, 70 U. Chi. L. Rev. 1297 (2003)..... 8

David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201 (2001)..... 18

Josh Blackman, *Gridlock*, 130 Harvard L. Rev. 241 (2016)..... 14

Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672 (2012)..... 6, 10

Committee on Preventive Services for Women, Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gap* (2011)..... 21

Demophilus, The Genuine Principles of the Ancient Saxon, or English Constitution, in 1 American Political Writing 340 (Hyneman and Lutz eds., 1983) (1776)..... 8

W. Cole Durham, Jr. *et al.*, *Traditionalism, Secularism, and the Transformative Dimensions of Religious Institutions*, 1993 BYU L. Rev. 421 (1993)..... 19

E. Donald Elliott, *Re-Inventing Rulemaking*, 41 Duke L. J. 1490 (1992) 18

The Federalist, No. 33 9

The Federalist, No. 47 ..... 4, 9

The Federalist, No. 75 9

The Federalist, No. 78 9

Food and Drug Administration, Birth Control Guide, http://bit.ly/2prP9QN 21

Beatrice Catherine Franklin, *Irreparability, I Presume? On Assuming Irreparable Harm for Constitutional Violations in Preliminary Injunctions*, 45 Colum. Hum. Rts. L. Rev. 623 (2014) 13-14

Philip Hamburger, *Exclusion and Equality: How Exclusion from the Political Process Renders Religious Liberty Unequal*, 90 Notre Dame L. Rev. 1919 (2015) ..... *passim*

HRSA, Women's Preventive Services Guidelines (Oct. 2017) https://www.hrsa.gov/womens-guidelines/index.html 22

Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel*, 125 Yale L.J. Forum 369 (2016) 26

Letter by T.Q., Boston Gazette & Country J. (Apr 18, 1763), reprinted in 1 American Political Writing during the Founding Era 1760-1805 19 (Charles S. Hyneman and Donald S. Lutz eds., 1983) 8

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996) 16

Jason Mazzone, *The Waiver Paradox*, 97 Nw. U. L. Rev. 801 (2003) 12

Michael W. McConnell, *The Ninth Amendment in Light of Text and History*, 2010 Cato Sup. Ct. Rev. 13 11

Montesquieu, The Spirit of the Laws (Thomas Nugent trans., 1900) (1748) 8

Note, *Major Questions Objections*, Harvard L. Rev. 2191 (2016) 14

Peter Orszag, *Too Much of a Good Thing*, New Republic (Sept. 14, 2011) 18

Theophilus Parsons, The Essex Result, in 1 American Political Writing 480 (Hyneman and Lutz eds., 1983) (1778) 8-9

Martin H. Redish & William D. Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 Ariz. L. Rev. 289 (2017) 14

Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 Iowa L. Rev. 231 (2012) 25

Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. Colo. L. Rev. 1021 (2005) 19, 25

Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000) 15

Ruti Teitel, *Post-Communist Constitutionalism: A Transitional Perspective*, 26 Colum. Hum. Rts. L. Rev. 167 (1994) 4

Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. Rev. 1465 (1999) 19

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a nonprofit law firm dedicated to the free expression of all religious traditions. Becket has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among many others, in lawsuits across the country and around the world.

The Becket Fund frequently represents religious people who seek to vindicate their constitutional rights against government overreach, both as individuals or in community with others. See, *e.g.*, *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015) (prisoner appearance regulation); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171 (2012) (ministerial exception). In particular, the Becket Fund has long sought, both as amicus and merits counsel, to protect religious and other Americans against encroachment on their First Amendment rights by unelected government officials. See, *e.g.*, *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (Attorney General used delegated authority under Controlled Substances Act to deny accommodation to religious group); *Agency for Int'l Dev.* v. *All. for Open Soc'y Int'l*, 570 U.S. 205 (2013) (USAID used delegated authority under the Leadership Act to mandate

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[1] No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund the preparation or submission of the brief. All parties have consented to the filing of this brief.

grantee speech concerning prostitution); *Burwell* v. *Hobby Lobby*, 134 S. Ct. 2751 (2014) (HHS used delegated authority under the Affordable Care Act to impose contraceptive mandate on religious business owners); *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016) (HHS used delegated authority under the Affordable Care Act to impose oft-revised contraceptive mandate on nonprofit religious organizations); *Harvest Family Church* v. *Fed. Emergency Mgmt. Agency*, No. 17A649 (application withdrawn Jan. 4, 2018) (FEMA used delegated authority under the Stafford Act to issue guidance categorically excluding houses of worship from disaster aid grant program; guidance rescinded after the Court called for a response to Texas churches' emergency application for injunction); *Chabad of Key West, Inc.* v. *Fed. Emergency Mgmt. Agency*, No. 4:17-cv-10092-JLK (S.D. Fla., complaint filed Dec. 4, 2017) (parallel case involving Florida synagogues).

The Becket Fund believes that at stake in this litigation is not only the scope of SORNA liability that may be imposed upon criminal defendants, but also the ability of religious people to engage in religious activity without undue interference by unelected government officials. It therefore submits this brief to urge the Court to adopt a rule of strict construction against delegation with respect to Executive Branch actions that burden the free exercise of religion.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The East German Constitution protected all the same core civil and political rights ours does. Every citizen had the right, "in accordance with the principles of [that] Constitution, to express his opinion

freely and publicly."[2] The freedom of the press was guaranteed, as was the right to assemble.[3] The Constitution even protected the "right to profess a religious belief and to engage in religious activities."[4] In fact, many more rights were protected in the East German Constitution than our own, including the right to a job, the right to a residence, and the right to leisure and recreation.[5]

But of far more practical importance than these human rights guarantees were the structural provisions that allocated political power. For instance, the German Democratic Republic was defined as a "political organization * * * under the leadership of the working class and its Marxist-Leninist party."[6] The powers of the East German people were delegated to a single

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[2] Verfassung der Deutschen Demokratischen Republik, Artikel 27(1) (Staatsverlag der Deutschen Demokratischen Republik, Berlin 1976, 8th ed. 1989) ("Jeder Bürger der Deutschen Demokratischen Republik hat das Recht, den Grundsätzen dieser Verfassung gemäß seine Meinung frei und öffentlich zu äußern.").

[3] *Id.*, Artikel 27(2) (press); Artikel 28 (assembly).

[4] *Id.*, Artikel 39(1) ("Jeder Bürger der Deutschen Demokratischen Republik hat das Recht, sich zu einem religiösen Glauben zu bekennen und religiöse Handlungen auszuüben.").

[5] *Id.*, Artikel 24(1) (job); Artikel 37 (residence); Artikel 34 (leisure and recreation).

[6] *Id.*, Artikel 1 ("Sie ist die politische Organisation der Werktätigen in Stadt und Land unter der Führung der Arbeiterklasse und ihrer marxistisch-leninistischen Partei.").

state organ: "The alliance of all powers of the People finds its organized expression in the National Front of the German Democratic Republic."[7] And the National Front was in turn designated as the locus where all of the parties and mass organizations in East Germany "unified * * * all the powers of the People."[8]

This concept of political power delegated to a single organ of government was consistent with the principle of constitutional law, widely adopted within the Warsaw Pact countries, of the "unity of state power."[9] And the doctrine of unity of state power directly correlated with personal constitutional and civil rights that proved to be "illusory."[10]

Our own Constitution is premised instead on the separation of powers, and that has made all the difference. By distributing power among both federal and state sovereigns, and among three separate branches within the federal government, the Founders sought to prevent tyranny. See The Federalist No. 47, at 336 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same

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[7] *Id.*, Artikel 3(1) ("Das Bündnis aller Kräfte des Volkes findet in der Nationalen Front der Deutschen Demokratischen Republik seinen organisierten Ausdruck."

[8] *Id.*, Artikel 3(2) ("In der Nationalen Front der Deutschen Demokratischen Republik vereinigen die Parteien und Massenorganisationen alle Kräfte des Volkes * * *").

[9] Ruti Teitel, *Post-Communist Constitutionalism: A Transitional Perspective*, 26 Colum. Hum. Rts. L. Rev. 167, 169 (1994).

[10] *Ibid.*

hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."). And by preventing one branch of the federal government from giving its power to another, the non-delegation doctrine protects, or ought to protect, the Founders' careful design.

The problem presented by this appeal is that the modern administrative state—constitutionally speaking, a relatively recent phenomenon—does not fit neatly into the Framers' model. As a practical matter, modern Executive Branch agencies often make law, that is, rules that bind private and public conduct, even though they are part of the Executive Branch rather than the Legislative Branch.

And when Executive Branch officials make law, they often ride roughshod over personal civil rights, including specifically First Amendment and other protections for the free exercise of religion. The Court need look no further than its own docket in the last several years to see multiple examples of administrative agencies exercising delegated powers that have given short shrift to free exercise. Thus, just as concentration of power in one state organ in East Germany meant that government officials were free to ignore personal constitutional rights, concentrating both legislative and executive powers in Executive Branch officials means administrative agencies can pick and choose which personal constitutional rights to honor.

This structural problem can be mitigated with a structural solution rooted in founding-era understandings of the nature of the judicial role. As Professors

Chapman and McConnell have observed, in the founding era courts used a principle of equitable interpretation to narrow the application of rules that infringed on natural rights—the predecessors to our now-codified civil rights. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1706 (2012).

The same principle ought to hold today in the context of Executive Branch regulatory action: where a rule, guidance, or other Executive Branch action threatens to impinge on personal constitutional rights against the government, that rule can be invalidated under a strict construction of the law it is promulgated under.

Adopting this approach would not only comport with judicial practice at the founding, but it would also be consistent with this Court's longstanding practice of treading carefully where personal constitutional rights are implicated, as demonstrated by precedents in areas as disparate as the waiver of constitutional rights, the major questions doctrine, and *Bose* constitutional facts.

Strictly construing laws to invalidate Executive Branch actions that impinge on personal constitutional rights would ensure that no one may join together powers the Constitution has made separate. And that would help preserve individual liberty.

ARGUMENT

I. Where Executive Branch actions burden free exercise rights, delegations of power should be strictly construed.

The Court has not yet applied nondelegation doctrine in the context of free exercise rights.[11] Guidance is available, however, in both history and this Court's precedents. Founding-era understandings of how to construe executive actions that interfered with natural rights, and this Court's careful treatment of constitutional rights in a variety of other contexts, confirm that delegation of authority from Congress to the Executive Branch should be narrowly construed where the Executive Branch action at issue burdens free exercise rights.[12]

A. For the Framers, Executive Branch actions that interfered with core civil rights would have been subject to narrow construction.

1. During the founding era, and in the authorities the Founders relied on, the legislative power was seen

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[11] Arguably, however, the religious freedom of the defendants in *A.L.A. Schechter Poultry Corporation* v. *United States*, 295 U.S. 495 (1935) was an unspoken issue lurking beneath the surface of that case. The defendants ran a kosher slaughterhouse under rabbinic supervision. That Nazi Germany had very recently issued executive decrees banning all forms of kosher slaughter cannot have been entirely unknown to the Justices.

[12] This principle would not apply to cases where an Executive Branch official *accommodated* religion rather than burdening it.

as the power to make the laws, rules, and regulations—terms used interchangeably—that bind and govern society. See Larry Alexander & Saikrishna Prakash, Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated, 70 U. Chi. L. Rev. 1297, 1305-06 (2003). Thus, for instance, William Blackstone characterized the legislative power as the "power of making laws" to "prescribe the rule of civil action." 1 William Blackstone, Commentaries *52. Similarly, Montesquieu saw the legislative power as the power to enact "temporary or perpetual laws, and amend[ ] or abrogate[ ] those that have already been enacted." Montesquieu, The Spirit of the Laws 182 (Thomas Nugent trans., 1900) (1748).

American political writings during the colonial period took a similar view. A 1763 letter published in a Boston newspaper observed that Montesquieu had been critical of "entrusting the same gentlemen with legislative and judiciary power, or the power of making laws and judging of them after they are made." Letter by T.Q., Boston Gazette & Country J. (Apr 18, 1763), reprinted in 1 American Political Writing during the Founding Era 1760-1805 19, 20 (Charles S. Hyneman and Donald S. Lutz eds., 1983). Another early American author, describing the practices of the Saxons, equated "legislative authority" with "ma[king] laws and regulations." Demophilus, The Genuine Principles of the Ancient Saxon, or English Constitution, in 1 American Political Writing 340, 345 (Hyneman and Lutz eds., 1983) (1776). And a foundational account of the Massachusetts state constitutional convention characterized legislative power as that which "mak[es] laws, or prescrib[es] such rules of action to every individual in the state." Theophilus Parsons,

The Essex Result, in 1 American Political Writing 480, 492 (Hyneman and Lutz eds., 1983) (1778).

The same view of the nature of legislative power prevailed during the ratification debates. For example, Alexander Hamilton rhetorically asked, "What is a LEGISLATIVE power, but a power of making LAWS?" The Federalist No. 33, at 245 (A. Hamilton) (B. Wright ed. 1961). Likewise, he noted in Federalist No. 75 that the "essence of the legislative authority is to enact laws, or, in other words to prescribe rules for the regulation of the society." The Federalist No. 75, at 476 (A. Hamilton). See also The Federalist No. 47, at 338 (J. Madison) ("The magistrate in whom the whole executive power resides cannot of himself make a law.").

The founding generation would therefore very likely have viewed modern-day agency rulemaking as an exercise of the legislative power.[13] And that would mean that courts had a duty to temper that power if it seeped beyond its proper bounds. See The Federalist No. 78, at 469-70 (A. Hamilton) (Clinton Rossiter ed., 1961). (observing that courts would be "of vast importance in mitigating the severity and confining the operation of [unjust and partial] laws").

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[13] Where Executive Branch action strays into the realm of legislative power, the Constitution's requirements of bicameralism and presentment also apply. See *INS* v. *Chadha*, 462 U.S. 919, 951 (1983) ("the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.").

That baseline assumption—that courts would exercise their interpretive powers to ease the impact of unreasonable laws—also appeared in the writings of Blackstone: "[W]here some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament." 1 Blackstone, Commentaries *91. Blackstone's view regarding "collateral matter" was mainstream. For example, scholars view Sir Edward Coke's opinion in the famous *Dr. Bonham's Case* not as an early example of judicial review, but rather of equitable interpretation. See Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1690-91 & n.60 (2012) (reviewing scholarly assessments of *Dr. Bonham's Case*, (1610) 77 Eng. Rep. 638 (C.P.); 8 Co. Rep. 107a). And this judicial practice was by no means confined to the English side of the Atlantic: To protect liberty, early American "courts engaged in equitable interpretation to construe statutes to avoid abrogating basic due process norms." *Id.*, 121 Yale L.J. at 1706.

2. The history of natural rights jurisprudence also points towards strict construction. At the time of the founding, English and American courts did not shy away from invoking natural rights in reaching their decisions. But today, founding-era natural rights have been largely codified as private civil rights. Thus how founding-era courts treated natural rights can serve as a rough historical analogue for how courts today deal with private civil rights.

As Professor McConnell has remarked, "unenumerated natural rights [we]re protected through some combination of political self-control on the part of the

political branches (reinforced by the separation of powers) and equitable interpretation by the courts, which entails the narrow construction of statutes so as to avoid violations of natural rights." Michael W. McConnell, *The Ninth Amendment in Light of Text and History*, 2010 Cato Sup. Ct. Rev. 13, 18. Thus, "courts had the power to engage in equitable interpretation, under which statutes were interpreted narrowly so as to avoid violating the law of nature." *Id.* at 21. This created a legal environment where "natural rights control in the absence of sufficiently explicit positive law to the contrary," which can be viewed "as a clear statement rule for abrogating unenumerated natural rights." *Id.* at 18.

Equitable interpretation in the context of natural rights "was predicated on the charitable assumption that the legislature likely did not intend, by the use of broad language not explicitly addressed to the point at issue, to violate the law of nature." McConnell, *The Ninth Amendment in Light of Text and History*, 2010 Cato Sup. Ct. Rev. at 22. And that charitable assumption did not trample on the legislative power, as one American judge observed in 1784: "When the judicial make these distinctions, they do not controul the Legislature; they endeavour to give their intention its proper effect." *Ibid.* (quoting *Rutgers* v. *Waddington* (N.Y. City Mayor's Ct. 1784)). See also Philip Hamburger, Judicial Duty 344-57 (2008) (describing early American cases applying equitable interpretation, particularly the *Rutgers* case).

It is thus consistent with how founding-era courts saw their judicial duty to allow for equitable interpretations of law to avoid interfering with core personal rights—the latter-day incarnation of natural rights—

in particular cases. And a strict construction of laws that potentially burden core personal rights is also consistent with the wider practice of this Court to seek to harmonize laws rather than to read conflicts into them. See, *e.g.*, *Epic Systems Corp.* v. *Lewis*, No. 16-285, 2018 WL 2292444, at *8 (May 21, 2018) (courts must harmonize potentially conflicting laws absent express Congressional command).

B. This Court has recognized in a variety of contexts that government actions burdening core private rights are forbidden absent express law strictly construed.

Blackstone observed "that the English Constitution required that no subject be deprived of core private rights except in accordance with the law of the land." *Dep't of Transp.* v. *Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1244 (2015) (Thomas, J., concurring) (citing 1 Commentaries 129, 134, 137–138). True to that tradition, this Court often prohibits government infringement of core private rights absent an express law, strictly construed. The Court has consistently sought to tread lightly where core constitutional and civil rights are concerned. We offer some examples below.

1. ***Waiver of constitutional rights.*** This Court has long held that even constitutional rights can be waived. See Jason Mazzone, *The Waiver Paradox*, 97 Nw. U. L. Rev. 801, 801 (2003) (noting that under Supreme Court doctrine, various constitutional criminal protections can be waived or bargained away). Yet, before such a waiver can occur, a high standard for finding that a party waived constitutional rights is applied. See, *e.g.*, *Tague* v. *Louisiana*, 444 U.S. 469, 470

(1980) ("This Court has always set high standards of proof for the waiver of constitutional rights.") (quoting *Miranda* v. *Arizona*, 384 U.S. 436, 475 (1966)). Further, under the doctrine of unconstitutional conditions, constitutional rights cannot be waived for a government benefit, whereas non-constitutional rights can be so forfeited. See *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) ("[E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, * * * [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests."). See also Mazzone, at 807-08 ("the Supreme Court has invalidated a wide range of government efforts to compel individuals to forego constitutional rights as the condition for receiving governmental benefits").

2. ***Injunctive relief.*** In seeking a preliminary injunction, a plaintiff must show irreparable harm. See *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). But that all changes in the context of constitutional rights as plaintiffs have a much lower hurdle to clear: "When an alleged deprivation of a constitutional right is involved, * * * most courts hold that no further showing of irreparable injury is necessary." Charles Alan Wright et al., 11A Federal Practice & Procedure § 2948.1. In *Elrod* v. *Burns*, Justice Brennan declared that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." 427 U.S. 347, 373 (1976) (plurality op.) Since then, lower courts have applied this standard in various constitutional contexts. See Beatrice Catherine Franklin, *Irreparability, I Presume? On As-*

suming Irreparable Harm for Constitutional Violations in Preliminary Injunctions, 45 Colum. Hum. Rts. L. Rev. 623, 635-44 (2014) (collecting cases in the areas of speech, other First Amendment rights, Fourth and Eighth Amendment rights, and Fourteenth Amendment rights).

3. ***Constitutional facts under* Bose.** Normally, federal appellate courts defer to a lower court's factual findings under a "clearly erroneous" standard of review. See *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986). But when examining a "constitutional fact"—facts necessary to the constitutional analysis of a claim—the Court has instead required appellate courts to "make an independent examination of the whole record." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984). The "constitutional fact doctrine" has been viewed by scholars as "truly foundational to our constitutional system and essential to the judicial protection of constitutional rights" because it "serves as the cornerstone of our system of separation of powers." Martin H. Redish & William D. Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 Ariz. L. Rev. 289, 290-91 (2017).

4. ***Major questions doctrine.*** Strict construction of laws potentially infringing core private rights in the context of nondelegation concerns also resembles this Court's major questions doctrine. Note, *Major Questions Objections*, 129 Harvard L. Rev. 2191, 2203 (2016) ("it is better to characterize the major question cases as occasions where the Court thought it necessary to engage in vaguely equitable intervention"). Just as the Court refuses to defer to agencies in the realm of "major question," see Josh Blackman, *Gridlock*, 130 Harvard L. Rev. 241, 261-65 (2016), so too

should the Court refuse to defer to agencies in the realm of nondelegation and the infringement of constitutional rights. And adopting such a rule of construction would enable agencies to be treated no better than Congress, to which the Court applies the constitutional avoidance canon. See Ilan Wurman, *Constitutional Administration*, 69 Stanford L. Rev. 359, 415 (2017). See also *id.* ("Deploying all the tools of statutory construction to determine what power Congress actually intended to delegate empowers our elected representatives and serves the same republican purpose served when courts determine whether Congress has transgressed the limits of the powers "We the People" delegated to Congress in the Constitution.").

5. ***Constitutionally-inspired nondelegation canons.*** As Professor Sunstein has noted, although the Court has not directly enforced the nondelegation doctrine since 1935, it has promulgated a host of nondelegation canons of construction that "represent a salutary kind of democracy-forcing minimalism, designed to ensure that certain choices are made by an institution with a superior democratic pedigree." Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 317 (2000). "Indeed," he argues, these "nondelegation canons turn out to be a contemporary incarnation of the founding effort to link protection of individual rights, and other important interests, with appropriate institutional design." *Id.*

According to Professor Sunstein, the Court has adopted several "constitutionally inspired nondelegation canons":

(1) agencies are not permitted to construe statutes so as to raise serious constitutional doubts;

(2) agencies are not allowed to interpret ambiguous provisions to preempt state law;

(3) agencies not allowed to apply statutes retroactively; and

(4) the rule of lenity.

Id. at 331-32 (collecting cases).[14]

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As history and this Court's consistent practice show, where core constitutional and civil rights are at stake, courts ought to proceed carefully. In the context of Executive Branch actions that burden free exercise, that means that courts should strictly construe legislation against delegation of power to the Executive Branch.

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[14] In the same vein, Dean Manning suggests that "[a]n independent judicial check upon agency interpretive authority would insert a layer of security against unwise or oppressive agency lawmaking" and "promote the separation of powers objective of preserving liberty by dispersing government authority." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 682-83 (1996). Requiring agencies "to speak more precisely in order to bind an independent interpreter" would mean that agencies "would have a harder time adopting policies contrary to the public interest." *Id.* at 683.

II. Strict nondelegation is needed to protect free exercise rights, particularly for religious minorities.

A. Administrative rulemaking is uniquely unresponsive to religious concerns.

As the Court's religious liberty docket demonstrates, administrative agencies, unlike legislatures, do not always feel compelled to balance important religious liberty concerns with other societal interests.

As an initial matter, the administrative process intentionally dodges the normal give-and-take of the political process. It was designed that way, largely to eliminate what was seen as the problem of having to accommodate minority interests. Woodrow Wilson, one of the early leading advocates for increased administrative authority, fretted that public opinion was "meddlesome" and that it was too hard to persuade "a voting majority of several million heads." Philip Hamburger, *Exclusion and Equality: How Exclusion from the Political Process Renders Religious Liberty Unequal*, 90 Notre Dame L. Rev. 1919, 1946-47 & n.79 (2015) (quoting Woodrow Wilson, *The Study of Administration*, 2 Pol. Sci. Q. 197, 208 (1887)). To Wilson, the primary trouble came not in the *number* of heads but in the diverse *types* of heads: democracy required persuading "the mind, not of Americans of the older stocks only, but also of Irishmen, of Germans, [and] of negroes." *Id.* at 1947 & n.80 (quoting Wilson, 2 Pol. Sci. Q. at 209). Unfortunately, Wilson's anti-democratic views have persisted. In 2011, a former Director of the Office of Management and Budget publicly advocated that the country "need[s] less democracy," and that the "serious problems facing our country" could

best be solved by making "our political institutions * * * less democratic." Peter Orszag, *Too Much of a Good Thing*, New Republic (Sept. 14, 2011), https://newrepublic.com/article/94940/peter-orszag-democracy.

Of course in some situations agencies provide thirty days of notice and comment for certain types of rules. But even this democracy-lite aspect of the administrative process is widely understood as often little more than a "charade." David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 231 (2001). "No administrator in Washington" truly relies on notice-and-comment; it is rather "a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues." E. Donald Elliott, *Re-Inventing Rulemaking*, 41 Duke L. J. 1490, 1492 (1992). The resulting reality is that "administrators [are] almost entirely insulated from the public" and unreached by the dialogue and debate that invigorates and guides the democratic process. Hamburger, 90 Notre Dame L. Rev. at 1940. What is more, "[e]ntire categories of lawmaking—such as the interpretation done through guidance, manuals, letter opinions, briefs, etc.—does not really require notice, let alone comment." *Ibid.*

This exclusion of American citizens from the decision-making process "comes with a distinctively hard edge for many religious Americans," "particularly * * * the relatively orthodox." Hamburger, 90 Notre Dame L. Rev. at at 1921, 1928. Agency officials simply are not "as sensitive to religious sensibilities as are representative lawmakers." *Id.* at 1921. They are not only insulated from "political pressures," but also

infused with a "self-conscious rationalism and scientism" making them "relatively indifferent * * * to religious concerns." *Ibid.*; see also Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. Rev. 1465, 1487 n.57 (1999) (noting "agencies' tunnel vision" in weighing religious matters "alongside their more traditional concerns"). This contributes to an "insensitivity of governmental bureaucracy," which has been a "continual and disturbing source of imposition" upon religious Americans, especially "religious minorities." Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. Colo. L. Rev. 1021, 1025 (2005).

Forced to appeal to indifferent and unresponsive administrators, "individuals or groups whose religious liberty is burdened by * * * administrative regulation" have significantly reduced "leverage * * * to induce government bureaucrats to accommodate religious practices." W. Cole Durham, Jr. *et al.*, *Traditionalism, Secularism, and the Transformative Dimensions of Religious Institutions*, 1993 BYU L. Rev. 421, 450 (1993). This may have been of little moment a hundred years ago, but "in the modern bureaucratic state, where government regulation increasingly pervades all social space," religious considerations are heavily disadvantaged, burdened by "a mass of administrative rules and guidelines," and "often sacrificed to lower order bureaucratic values such as administrative efficiency." *Ibid.* This Court perhaps best summarized—and rejected—agencies' sometimes blinkered decisionmaking in *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, noting the "classic rejoinder of bu-

reaucrats throughout history" when asked for religious exemptions: "If I make an exception for you, I'll have to make one for everybody, so no exceptions." 546 U.S. 418, 436 (2006).

By contrast, although Congress can and does also overlook religious liberty interests, "Congress is far more sensitive to religious sensibilities than administrators." Hamburger, 90 Notre Dame L. Rev. at 1943. Thus, "for purposes of religious liberty, a congressional veto on executive lawmaking is no substitute for the Constitution's requirement of congressional legislation, subject to an executive veto." *Ibid.* Especially given that executive control is limited given the number of "administrators mak[ing] binding regulations in more or less 'independent' agencies, with varying degrees of formal independence from political control." *Id.* at 1944.

B. As this Court's cases demonstrate, government officials often use delegated powers to burden religious exercise.

In just the past couple of decades, a number of religious liberty cases before this Court and in the lower courts clearly illustrate how delegated authority tends to lead unelected officials to burden religious exercise.

In *O Centro*, for example, United States Customs officials seized a small religious group's shipment of sacramental tea made from two Amazonian plants, one of which contained a hallucinogen listed under the Controlled Substances Act. 546 U.S. at 425. The customs inspectors also "threatened the [small religious group] with prosecution." *Ibid.* This Court upheld the sect's religious rights under RFRA. *Id.* at 423. In

reaching its decision, the Court noted that the Attorney General had been delegated power under the Controlled Substances Act to provide a waiver to the religious group, but had chosen not to. *Id.* at 432-33.

Several other cases stem from the contraceptive mandate regulations issued by government agencies under the Affordable Care Act ("ACA"). The ACA itself made no mention of a contraceptive mandate. Instead, the ACA required certain employers to provide health insurance to their employees that included coverage for "preventative care and screenings" for women. 42 U.S.C. § 300gg-13(a)(4); 29 U.S.C. § 1185d.

But Congress did not specify what "preventive care and screenings" means. Instead, Congress delegated that task to the Health Resources and Services Administration ("HRSA") of the Department of Health and Human Services ("HHS"). 42 U.S.C. § 300gg-13(a)(4). HHS, in turn, asked the quasi-private Institute of Medicine ("IOM"), for recommendations. IOM recommended that HHS define "preventive care" to include, among other things, "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." Committee on Preventive Services for Women, Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gap* 109-10 (2011). The 20 FDA-approved contraceptive methods include both drugs and devices that operate to prevent fertilization of an egg, and drugs and devices that can prevent implantation of a fertilized egg. Food and Drug Administration, Birth Control Guide, http://bit.ly/2prP9QN. Only days after the recommendations were published, HHS adopted them entirely, by means of a post on HRSA's

website. See HRSA, Women's Preventive Services Guidelines, (Oct. 2017) https://www.hrsa.gov/womens-guidelines/index.html; 76 Fed. Reg. 46,621 (Aug. 3, 2011), 77 Fed. Reg. 8,725 (Feb. 15, 2012); 45 C.F.R. § 147.130(a)(1)(iv). Thus, Congress outsourced figuring out what "preventive care and screenings" were to HHS, and HHS outsourced that inquiry to IOM. It is highly unlikely that politically accountable Members of Congress would have created the contraceptive mandate. But HHS had no hesitation rushing in with its delegated power where Congress feared to tread.

As the Court is aware, the agency-created contraceptive mandate resulted in nationwide litigation involving several hundred religious plaintiffs and multiple trips to this Court. See, *e.g.*, *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). *Zubik* v. *Burwell*, 136 S. Ct. 1557, 1560 (2016). After insisting to this Court in *Hobby Lobby* that the version of the mandate at issue there was the least restrictive alternative, and then insisting to this court in *Zubik* that a different version of the mandate was the least restrictive alternative, HHS determined that it was possible to provide both religious freedom and contraceptive coverage, and issued an interim final rule to that effect. See 82 Fed. Reg. 47,792 (Oct. 13, 2017).[15] And the government is also now offering to pay directly for contraceptive coverage by means of its longstanding Title X program. See 83 Fed. Reg. 25,502 (June 1, 2018).

Another case shows how long it can take members of religious minorities to obtain relief from regulatory

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[15] As of this writing, the interim final rule's validity is the subject of appeals in both the Third and Ninth Circuits.

agencies. In 2006, an undercover agent of the United States Fish and Wildlife Service attended a Native American religious ceremony and confiscated religiously-significant eagle feathers from a Lipan Apache religious leader named Pastor Robert Soto. See *McAllen Grace Brethren Church* v. *Salazar*, 764 F.3d 465, 468 (5th Cir. 2014). For the next ten years, Pastor Soto pursued the return of his feathers from the Department of the Interior. He was initially denied possession of the eagle feathers because Department of the Interior regulations promulgated under the Bald and Golden Eagle Protection Act required that he be a member of a federally-recognized tribe, and while the Lipan Apache Tribe was recognized by historians, sociologists, and the State of Texas, it was not recognized by the federal government. *Id.* at 469.

When the case finally reached it, the Fifth Circuit ruled that the Department's regulations likely violated RFRA because the Department did not "demonstrat[e] that a possession ban on all but a select few American Indians" constituted the least restrictive means of achieving a compelling governmental interest. *McAllen*, 764 F.3d at 479-80. In 2016, the Department entered a settlement agreement with Pastor Soto that recognized the rights of Pastor Soto and other members of his congregations to pick up naturally molted feathers from the wild, exchange feathers with other Native Americans, and fashion feathers into objects for ceremonial use. See Settlement Agreement, *McAllen Grace Brethren Church* v. *Jewell*, No. 07-00060 (S.D. Tex. filed June 13, 2016), ECF No. 83-1, https://s3.amazonaws.com/becketpdf/Exhibit-1-Settlement-Agreement-file-stamped.pdf.

Another longstanding regulatory form of discrimination against religious exercise ended earlier this year as a result of litigation. For decades, FEMA had used the power delegated to it under the Stafford Disaster Relief and Emergency Assistance Act to issue non-regulatory guidance denying churches, synagogues, mosques, and other houses of worship access to disaster aid grants. This was so even though federal disaster assistance law specifically prohibits "discrimination on the grounds of race, color, religion" in the distribution of disaster aid. 42 U.S.C. § 5151(a).

After Hurricane Harvey devastated Texas and Hurricane Irma damaged Florida, two lawsuits were filed against FEMA's guidance, one by churches in Texas and another by synagogues in Florida. See *Harvest Family Church* v. *Federal Emergency Management Agency*, No. 17A649 (application withdrawn Jan. 4, 2018) (Texas churches' emergency application for injunction); *Chabad of Key West, Inc.* v. *Federal Emergency Management Agency*, No. 4:17-cv-10092-JLK (S.D. Fla., complaint filed Dec. 4, 2017), ECF No. 1 (Florida synagogues). The Department of Justice defended FEMA's guidance all the way through the lower courts, but once the Court asked the Solicitor General to respond to the Texas churches' application for an injunction, FEMA decided to rescind its guidance instead. Congress subsequently used its legislative power to enact legislation requiring FEMA to treat houses of worship on equal terms to other applicants. See 42 U.S.C. § 5172(a)(3)(C).

All of these cases evince a similar pattern: government bureaucrats cut religious people no slack as to their religious exercise, even though those bureaucrats are enforcing "law" not enacted by the people's

representatives. And while the courts ultimately protected these specific parties' religious liberty, that's not always the case, especially with minority faiths. See Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 Iowa L. Rev. 231 (2012) (finding that, after controlling for other factors, Muslim claimants had a 22% chance of success in religious liberty cases in the federal courts from 1996-2005, whereas non-Muslim claimants had a 38% chance). But see Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. Colo. L. Rev. 1021, 1037 (2005) (finding that while minority faiths had a statistically similar success rate to other faiths in religious liberty claims brought in federal courts, Catholics and Baptist claimants fared worse).

C. Religious minorities in particular are at peril from Executive Branch actions taken with delegated authority.

Delegation of too much legislative authority to agencies places large swaths of lawmaking outside of the political process, resulting in particular harm to religious minorities. Concern over minorities has long been a concern of the Court, with *Carolene Products*' famous footnote four and its doctrinal progeny a prominent example. There, Justice Stone expressed concern about "statutes directed at particular religious * * * minorities," as well as "prejudice against discrete and insular minorities." *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938). Certainly there are religious groups today who are properly classified as "discrete and insular minorities." But "anonymous

and diffuse" religious minorities can be just as threatened. Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 724 (1985). And the size of a religious minority is irrelevant: "It is fundamentally mistaken to suppose that religious liberty is only for *small* religious minorities." Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel*, 125 Yale L.J. Forum 369, 375 (2016) (emphasis added). The Constitution does not delineate. And historically speaking, "[e]fforts to suppress the practices of large religious minorities create more social conflict than similar efforts to suppress small religious minorities." *Ibid.*

According to Professor Laycock, cultural shifts over the past half century have only exacerbated this trend. Whether "discrete and insular" or "anonymous and diffuse," whether large or small—religious individuals and organizations are much more in the minority today, particularly on social issues. For instance, "the sexual revolution has swept away the former religious majority on sexual matters." Laycock, 125 Yale L.J. Forum at 370. Thus today, "[r]eligious conservatives make the individual-rights arguments of a minority group because they *are* a minority group," even if they still sometimes have local majorities. *Ibid.* (emphasis added).

More generally, in "contemporary America," where "a very diverse society * * * has long tended towards theological liberalism," religious "orthodoxy is apt to be the stance of minorities that seek to preserve their distinctive beliefs in the face of majoritarian pressures to conform to more universal liberal views." Ham-

burger, 90 Notre Dame L. Rev. at 1929. Thus ironically, "in [our] theologically liberal society, orthodoxy is unorthodox." *Ibid.*

As a result, "[o]n many issues, religious Americans and their organizations increasingly cannot muster [popular] support," "[e]specially when they seek to protect relatively orthodox beliefs, or when they want to adhere to religious duties that are not aligned with popular liberal political views, religious Americans often find themselves alone." Hamburger, 90 Notre Dame L. Rev. at 1932-33. This creates a situation where "[t]hose who are sailing with prevailing winds, theological and political, do not suffer much from" being excluded by the administrative lawmaking process. *Id.* at 1933. But "[t]hose who are tacking against prevailing winds * * * have much to fear." *Ibid.*

* * *

Ultimately, however, the current state of affairs is irrelevant to the enduring legal questions the Court will face, because American society is enduringly pluralistic. Regardless of which way the prevailing political winds happen to be blowing at any given moment, religious minorities will always be with us, and one or more of them will be politically disfavored. At a particular point in American history the disfavored religious minority of the day may be Catholics or Mormons or Jews or Sikhs or Santeros or Jehovah's Witnesses or Evangelicals or Muslims. Someone will always be in peril of being the target of unaccountable government officials. The Court can go a long way towards ensuring that those religious minorities are protected by re-

quiring strict construction against delegation with respect to Executive Branch actions that burden religious exercise.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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In the

Supreme Court of the United States

HERMAN AVERY GUNDY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether SORNA's delegation of Authority to the Attorney General to issue regulations under 42 U.S.C. § 16913(d) violates the nondelegation doctrine.

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Yakus v. United States,
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Other Authorities

Adams, John, Letter XLIX, 1 A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 323 (The Lawbook Exchange Ltd. 3rd ed., 2001).....6

Blackstone, William, COMMENTARIES ON THE LAWS OF ENGLAND 58 (William S. Hein & Co. ed., 1992) 4

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Jefferson, Thomas, Jefferson to Adams, THE ADAMS-JEFFERSON LETTERS (Lester J. Cappon ed., 1959)..5

Locke, John, THE SECOND TREATISE ON GOVERNMENT 82 (Thomas P. Peardon, ed.,1997).....5

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life. This includes the principle at issues in this case that the legislative powers delegated to the national government are vested in a Congress elected by the people, not in an unelected bureaucracy. Center scholarship on this issue includes John C. Eastman, *The President's Pen and the Bureaucrat's Fiefdom*, 40 Harv. J.L. & Pub. Pol'y 639 (2017); John C. Eastman, *Did Congress Really Give the Secretary of Homeland Security Unfettered Discretion Back in 1986 to Confer Legal Immigrant Status on Whomever He Wishes?*, 15 Engage 27 (2014); John A. Marini, *The Politics of Budget Control: Congress, the Presidency, and the Growth of the Administrative State* (1992); Charles R. Kesler, *Separation of Powers and the Administrative State, in The Imperial Congress: Crisis in the Separation of Powers* (Gordon S. Jones & John A. Marini eds. 1989); *see also R.J. Pestritto, The Progressive Origins of the Administrative State: Wilson, Goodnow, and Landis*, Soc. Phil. & Pol'y, Jan. 2007, at 16. The Center has previously participated in a number of cases before this Court addressing related issues, including *Markle Interests, LLC v.*

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[1] Pursuant to Rule 37.3 have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than amici made a monetary contribution to fund the preparation and submission of this brief.

U.S. Fish & Wildlife Service, Nos. 17-74 and 17-71; *U.S. Dep't of Trans. v. Ass'n of American Railroads*, 135 S. Ct. 1225 (2015); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015); and *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427 (2014).

SUMMARY OF ARGUMENT

In *Reynolds v. United States*, 565 U.S. 432 (2012), this Court considered the applicability of the federal Sex Offender Register and Notification Act (SORNA) to individuals convicted of a covered offense whose conviction occurred before the effective date of the federal law. The statute at issue, 42 U.S.C. §16913(d) (since renumbered 34 U.S.C. §20913(d)) provides that "'*The Attorney General shall have the authority to specify the applicability* of the [registration] requirements ... to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction... .'" *Reynolds*, 565 U.S. at 436 (emphasis in original). This Court ruled that the statutory language did not mean that the Attorney General had authority to create exemptions from registration for those convicted prior to the effective date of the act. Instead, it meant that those individuals convicted before the effective date of SORNA were not required to register "until the Attorney General so specifies" under subparagraph (d). Justice Scalia, joined by Justice Ginsburg, dissented, noting

> Indeed, it is not entirely clear to me that Congress can constitutionally leave it to the Attorney General to decide—with no statutory standard whatever governing his discretion—whether a criminal statute will or will not apply to certain individuals. That

> seems to me sailing close to the wind with regard to the principle that legislative powers are nondelegable.

Id. at 450 (Scalia, J., dissenting). The question raised by Justices Scalia and Ginsburg is presented in this case.

This Court has long-noted that Congress may not delegate its power to make law granted by Article I, section 1 of the Constitution. *Wayman v. Southard*, 23 U.S. 1, 42 (1825); *Panama Refining v. Ryan*, 293 U.S. 388, 421 (1935). This "nondelegation" doctrine is rooted in both the plain text of the Constitution and the separation of powers design of the Constitution. *Loving v. United States*, 517 U.S. 748, 757 (1996); *Yakus v. United States*, 321 U.S. 414, 425 (1944).

Separation of powers is the key to the Constitution's protection of individual liberty. To protect the liberty of the people, the Framers of the Constitution divided power among the three branches of the federal government. Embedded in this structure is the idea that the government may not transfer power amongst themselves whenever they desire. "Congress manifestly is not permitted to abdicate or transfer to others the legislative functions with which it is vested." *Panama Refining*, 293 U.S. at 421.

To police the line between a lawful conferral of authority and an unconstitutional delegation of legislative power, this Court has required Congress to set forth an "intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton. Jr., & Co. v. United States*, 276 U.S. 394,

409 (1928). As Justice Thomas has pointed out, however, "the Constitution does not speak of 'intelligible principles.'" *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

Amicus urges this Court to reconsider the "intelligible principle" doctrine and to replace it with a requirement for judicially manageable standards to ensure executive agencies and officials are acting within the scope of the authority delegated by Congress. This Court has already ruled that the judiciary cannot defer to an administrative agency construction of a vague statute in order to locate an "intelligible principle." *Id.* at 472. But a vague or general statement of principle, combined with *Chevron* deference, effectively grants legislative power to the executive. It authorizes the agency to decide what the law shall be rather than simply conferring authority to decide how the law will be executed. *See Field v. Clark*, 143 U.S. 649, 693-94 (1892).

ARGUMENT

I. Separation of Powers Is the Key Structural Protection of Individual Liberty in the Federal Constitution

The Framers and Ratifiers of the Constitution believed that separation of powers was necessary to protect individual liberty, and they enshrined that principle in the structure of government. In this, the founding generation relied on the works of Montesquieu, Blackstone, and Locke for the proposition that institutional separation of powers was an essential protection against arbitrary government. See e.g. Montesquieu, THE SPIRIT OF THE LAWS 152 (Franz

Neumann ed. & Thomas Nugent trans., 1949); 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 58 (William S. Hein & Co. ed., 1992); John Locke, THE SECOND TREATISE ON GOVERNMENT 82 (Thomas P. Peardon, ed.,1997). This Court has repeatedly recognized this important purpose behind the structural separation of powers. *E.g.*, *N.L.R.B. v. Noel Canning*, 134 S.Ct. 2550, 2559 (2014); *Boumediene v. Bush*, 553 U.S. 723, 742-43 (2008); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring); *Loving*, 517 U.S. at 757-58; *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990).

The warnings of Montesquieu and others against consolidated power resulted in structural separation of power protections in the design of the federal government. James Madison, Federalist 51, THE FEDERALIST PAPERS 318 (Charles R. Kesler and Clinton Rossiter, eds., 2003); James Madison, Federalist 47, supra at 298-99; Alexander Hamilton, Federalist 9, supra at 67; see also Thomas Jefferson, Jefferson to Adams, THE ADAMS-JEFFERSON LETTERS 199 (Lester J. Cappon ed., 1959). That design divided the power of the national government into three distinct branches; vesting the legislative authority in Congress, the executive power in the President, and the judicial responsibilities in this Supreme Court. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

That design of separation is furthered, in the case of Congress, with restrictions on how the power can be exercised. The Framers and Ratifiers recognized that the legislative branch of government was vested with the most significant power. *Id.* at 949. To further protect individual liberty, the Constitu-

tion specifies the mode for the exercise of the legislative power vested in Congress. Legislation must be approved by both the House and the Senate (bicameralism) and presented to the President for approval (presentment). *Id.* at 952. Were Congress permitted to delegate its power to legislate, this careful scheme of bicameralism and presentment would be thwarted.

To preserve the structure set out in the Constitution, and thus protect individual liberty, the constant pressures of each branch to exceed the limits of their authority must be resisted. Any attempt by any branch of government to encroach on powers of another branch, even if the other branch acquiesces in the encroachment, is void. *Id.* at 957-58; *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880). The same is true if one branch of government attempts to delegate its powers to another branch.

The judicial branch, especially, is called on to enforce this essential protection of liberty. *Chadha*, 462 U.S. at 944-46. The Constitution was designed to pit ambition against ambition and power against power. James Madison, Federalist 51, THE FEDERALIST PAPERS, supra at 319; see also John Adams, Letter XLIX, 1 A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 323 (The Lawbook Exchange Ltd. 3rd ed., 2001). When this competition of interests does not stop an encroachment, however, it is the duty of this Court to void acts that overstep the bounds of separated power. *Buckley v. Valeo*, 424 U.S. 1, 123 (1976); *Kilbourn*, 103 U.S., at 199. This is a case that calls for intervention of the Court to enforce the separation of powers structure that lies at the core of our Constitution.

At one time, this Court was especially sensitive to the problem of delegations of legislative authority. *Panama Refining*, 293 U.S. at 421; *A.L.A Schechter Poultry Corp.*, 295 U.S. 495, 529-30 (1935). Recognizing that the details of execution must be left to the executive, however, this Court determined that delegations of authority to executive agencies were permissible so long as controlled by an "intelligible principle." *J.W. Hampton*, 276 U.S. at 409. In practice, however, this doctrine has proved neither intelligible nor principled, especially when broad delegations supported by only the vaguest of "intelligible principles" are coupled with *Chevron* deference that let the agency decide what the statute means.

II. The 'Intelligible Principle" Doctrine Has Failed To Limit Delegations of Legislative Power

In *J.W. Hampton*, this Court ruled that delegation does not violate the separation of powers when "Congress lays down [...] an intelligible principle that guides the exercise of authority or discretion." *J.W. Hampton*, 276 U.S. at 406. Under this standard, Congress may delegate its legislative power to an executive agency if, and only if, there is an intelligible principle that guides the exercise of authority or discretion. *J.W. Hampton*, 276 U.S. 394 at 406. This standard, at least at its inception, appeared to have some teeth.

In *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935), this Court noted that the intelligible principle doctrine "cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained." In *Panama*, the Court struck down a provision of the National

Industrial Recovery Act that authorized the President to prohibit interstate and foreign transportation of petroleum produced that exceeded state production quotas. *Panama Refining*, 293 U.S. at 405-06. Like the law at issue here, the Act did not say how the President was to make the decision authorized by the Act. Rather, it gave "to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment." *Id.*

Similarly, in *A.L.A. Schechter*, the Court struck down the law authorizing the President to approve "codes of fair competition" for trades and industries. The statute granted the President authority to "impose his own conditions, adding to or taking away from what is proposed as 'in his discretion' he thinks necessary 'to effectuate the policy' declared by the act." *A.L.A. Schechter Poultry*, 295 U.S. at 538-39. This Court ruled that the authority conferred on the President was an unconstitutional delegation of legislative power because it delegated to the President "virtually unfettered" authority. *Id.* at 541-42.

The schemes struck down in *Panama* and *A.L.A. Schechter Poultry* are little different from the power delegations upheld by the modern Court. Sweeping delegations of power tethered to so-called intelligible principles as vague as "the public interest," "fair and equitable," or "unduly and unnecessarily complicated." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 475-76. This Court admitted in *Whitman* that it has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or apply-

ing the law." *Id.* This abandons the Court's role, however, to enforce the structural separation of powers. *See Dept. of Trans. v. Ass'n of Am. Railroads*, 135 S.Ct. 1225, 1246 (2015) (Thomas, J., concurring in the judgment).

Justice Thomas notes this "approach runs the risk of compromising our constitutional structure." *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1215 (2015) (Thomas, J., concurring in the judgment). That constitutional structure is one upon which we rely as a structural protection of individual liberty. *Dept. of Trans.*, 135 S.Ct. at 1237 (Alito, J., concurring).

But this deference to Congress is compounded by a further deference to the executive agency that is the beneficiary of the delegation. Exceedingly broad delegations of power (such as regulation in the "public interest") have been upheld by the Court as a means of deferring to Congress' decision on the degree of policy judgment to be left to the agency. The Court then defers to the executive agency to decide what the "public interest" happens to be in any particular situation. *See F.C.C. v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) ("Our opinions have repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference"); *F.C.C. v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 793-94 (1978). There is no pretense that the agency is implementing a law enacted by Congress. *See Dept. of Trans.*, 135 S.Ct. at 1250 (Thomas, J., concurring in the judgment). Instead the executive is exercising legislative power delegated by Congress. Law is made by the executive, not Congress. *Id.* at

1251. The restrictions of bicameralism and present are avoided, and the constitutional scheme is simply discarded. *See id.* at 1241.

The "intelligible principle" doctrine has failed if it was meant as a check against an unconstitutional delegation of legislative power to the executive. This failure is compounded by a further deference to the executive on the meaning and scope of the legislative delegation. This Court should instead require Congress to enact judicially manageable guidelines to govern the scope of any delegations of authority. Only then can this Court once again take up its responsibility to enforce the prohibition on delegation of legislative power to executive agencies. *See id.* at 1246.

CONCLUSION

This Court should return to the original understanding of the Constitution's structural separation of powers and enforce the prohibition on the delegation of legislative powers. It can start on this task by requiring Congress to supply judicially manageable guidelines on the exercise of delegated authority.

DATED: June, 2018.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE COMPETITIVE ENTERPRISE INSTITUTE, REASON FOUNDATION, AND CASCADE POLICY INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Sex Offender Registration and Notification Act's delegation of authority to the Attorney General to issue regulations under 42 U.S.C. § 16913(d) violates the nondelegation doctrine.

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Union Bridge Co. v. United States,
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United States v. Nichols,
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Wayman v. Southard, 23 U.S. 1 (1825)..... 25

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Va. Const. § 2 (1776) 6

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1 Edw. VI 6. c. 12. § 4 (1547) 15

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34 U.S.C. § 20911 et seq. 2, 4

34 U.S.C. § 20913(d) 2, 27, 28, 30

Proclamation by the Crown Act,
31 Hen. VIII c. 8 (1539) 3, 15

Other Authorities

1 Henry de Bracton, *De Legibus et Consuetudinibus Angliae* 443 (Sir Travers Twiss trans., Kraus 1964). 14

1 Matthew Bacon, *A New Abridgment of the Law* (1768) 7

1 William Blackstone, *Commentaries on the Laws of England* (1765) 3, 15

2 James Kent, *Commentaries on American Law* (1827). 7

2 Max Farrand, *The Records of the Federal Convention of 1787* (1911) 6

2 William Blackstone, *Commentaries on the Laws of England* (1753) 14

4 David Hume, *The History of England from the Invasion of Julius Caesar to the Revolution in 1688* (1789) 15

8 Annals of Cong. (Joseph Gales, ed. 1798). 10, 11, 12, 13

Cynthia R. Farina, *Deconstructing Nondelegation*, 33 Harv. J.L. & Pub. Pol'y 87 (2010) 18

David Schoenbrod, *Power Without Responsibility* (1993) 22

Dina Mishra, *An Executive-Power Non-Delegation Doctrine for the Private Administration of Federal Law*, 68 Vand. L. Rev. 1509 (2015) 18

Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* (1890) 9

Gary Lawson & Guy Seidman, *A Great Power of Attorney: Understanding Our Fiduciary Constitution* (2017) 5

Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 Notre Dame L. Rev. 619 (2017) 5

John Baker, *Human Rights and the Rule of Law in Renaissance England*, 2 Nw. U.J. Int'l Hum. Rts. 3 (2004) 15

John Locke, *Second Treatise of Civil Government* (1690). 17

Joseph Postell, *"The People Surrender Nothing": Social Compact Theory, Republicanism, and the Modern Administrative State*, 81 Mo. L. Rev. 1003 (2016) 5

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Thomas Bever, *A Discourse on the Study of Jurisprudence and the Civil Law* (1766) 16

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Oregon. Cascade's mission is to promote public policies fostering individual liberty, economic opportunity, and personal responsibility. A significant threat to this mission is the continued expansion of government, including unauthorized delegation of regulatory authority to federal and state agencies.

SUMMARY OF ARGUMENT

Herman Gundy was convicted of violating the Sex Offender Registration and Notification Act ("SORNA"). Pub. L. No. 109-248, tit. I, 120 Stat. 587 (2006) (codified as amended at 34 U.S.C. § 20911 et seq.). SORNA itself does not specify whether its criminal penalties apply to individuals, such as Mr. Gundy, who were convicted of a sex offense *prior to* the statute's enactment. Instead, SORNA empowers the Attorney General to resolve this crucial question—along with any other rules of conduct the Attorney General wishes to impose on such individuals. 34 U.S.C. § 20913(d) ("The Attorney General shall have the authority to specify the applicability of the requirements of [SORNA] to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with [initial registration].").

Deciding which rules will govern Mr. Gundy's conduct is the sole province of this nation's legislature, not the Attorney General. This principle has deep roots in English common law. Sir Edward Coke declared that the executive could not "create any offence by his prohibition or proclamation, which was not an offence before." *Case of Proclamations* [1610],

77 ER 1352 (KB). When this principle was ignored, by delegating lawmaking power to the King in the Proclamation by the Crown Act (1539), Sir William Blackstone called it "the most despotic tyranny; and which must have proved fatal to the liberties of this kingdom." 1 *Commentaries on the Laws of England* *271 (1765).

Our Founders implemented this restriction in the Constitution through the Legislative Vesting Clause, U.S. Const. art. I, § 1, which in turn is properly interpreted in accordance with the common law of agency. The common law prohibits the subdelegation of any power that requires discretion or judgment. In contrast, ministerial duties, which are mandatory and essentially involve no discretion, may be subdelegated. This is the essence of the nondelegation doctrine.[2]

The Legislative Vesting Clause provides that only Congress has discretionary power over the general rules of private conduct. Ministerial duties, such as duties conditioned on whether a certain event has occurred, may be delegated by Congress.

During World War II, the Court, in response to the wartime emergency, allowed Congress to go beyond this limit. Congress' power was expanded to allow delegations not only to answer factual questions, but judgmentally select the facts on which policy is based. While not necessary for this case, the Court should

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[2] The doctrine is actually a prohibition on subdelegation, not nondelegation. Power is delegated to Congress by the people, and cannot be subdelegated to any other person. However, because it is commonly referred to as the nondelegation doctrine, that phrase will be used to describe it.

overrule these opinions to clarify the nondelegation doctrine.

SORNA delegates discretionary power to the Attorney General over the conduct of many private individuals. No factual determination is required of the Attorney General; instead, it is entirely up to his discretion. Such a delegation is inconsistent with the original meaning of the Legislative Vesting Clause, and the Court should rule it unconstitutional.

ARGUMENT

I. POWER DELEGATED BY THE PEOPLE TO CONGRESS CANNOT BE SUBDELEGATED

A. The Legislative Vesting Clause Incorporates the Common Law of Agency's Well-Established Prohibition on Subdelegation

The Constitution is an instrument of delegation. In its words, "We the people" "delegated to the United States by the Constitution" a set of enumerated powers. U.S. Const. preamble, amend. X. "The federal and state governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes." *The Federalist No. 46* (James Madison).

The Constitution delegates "all legislative powers" "in a Congress of the United States," but the text alone is silent as to subdelegations of that power. U.S. Const. art. I, § 1. The original meaning of this clause, as applied to subdelegations, can be understood only in the broader context in which those words were written.

The Constitution "must be interpreted in the light of the common law, the principles and history of which

were familiarly known to the framers of the constitution." *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898). "The language of the constitution, as has been well said, could not be understood without reference to the common law." *Id.*

The relevant common law context for this task is the common law of agency, which deals with the delegations of power from one party to another. *See* Gary Lawson & Guy Seidman, *A Great Power of Attorney: Understanding Our Fiduciary Constitution* 104–129 (2017); Joseph Postell, *"The People Surrender Nothing": Social Compact Theory, Republicanism, and the Modern Administrative State*, 81 Mo. L. Rev. 1003, 1016–17 (2016); *see also* Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 Notre Dame L. Rev. 619, 642 (2017) (surveying early case law applying the common law maxims).

James Iredell, who would become one of the first Supreme Court Justices, directly linked agency law to the Constitution. During the Constitution's ratification debates in North Carolina, Justice Iredell said that the Constitution "may be considered a great power of attorney." 4 Jonathan Elliot, *The Debates in the Several State Conventions of the Adoption of the Federal Constitution* 148 (1827). A power of attorney is the classic example of a document that creates an agency and is interpreted according to the common law of agency. Lawson & Seidman, *supra* at 3–4.

This is also demonstrated by the Constitution's ratification history. During the constitutional convention, James Wilson described the legislature as the people's "agents," stating that "[t]he people have a right to know what their agents are doing or have

done, and it should not be in the option of the Legislature to conceal their proceedings." 2 Max Farrand, *The Records of the Federal Convention of 1787* 260 (1911). At the constitutional convention itself, Oliver Ellsworth referred to Congress as the people's "agents." *Id.* at 377.

In ratifying the Constitution, the people of Rhode Island declared "[t]hat all power is naturally vested in, and consequently derived from the people; that [government officers] therefore are their trustees, and agents, and at all times amenable to them." Rhode Island Ratification 2nd point (May 29, 1790).

The Federalist Papers referred to the Constitution as "the intention of the people" and to statutes as the intention of their "agents." *The Federalist No. 78* (Alexander Hamilton). It referred to the federal government as "agents and trustees of the people." *The Federalist No. 46* (James Madison). It similarly referred to the President as the "principal agent" of appointments. *The Federalist No. 65* (Alexander Hamilton).

Government employees were commonly understood to have fiduciary duties as agents of the people. The Massachusetts Constitution referred to all officers of government, explicitly including the legislature, as the people's "agents." Mass. Const. art. V (1780). The Virginia, Vermont, and Pennsylvania Constitutions referred to all officers or magistrates of government as the people's "trustees." Va. Const. § 2 (1776); Penn. Const. declaration of rights IV (1776); Vt. Const. ch. I, § V (1777). The Maryland Constitution states that "all people invested with legislative or executive powers of government are the trustees of the public." Md. Const. art. IV (1776).

Understanding the common law of agency at the time of the Constitution's ratification requires an understanding of English common law, which described the agency law rule on subdelegation of power as such: "One who has an authority to do an act for another must execute it himself, and cannot transfer it to another; for this being a trust and confidence reposed in the party, cannot be assigned to a stranger." Matthew Bacon, 1 *A New Abridgment of the Law* 320 (1768).

James Kent, Chief Justice of New York, wrote that:

> An agent ordinarily, and without express authority . . . has not power to employ a sub-agent to do the business, without the knowledge or consent of his principal. The maxim is, that *delegatus non potest delegare* [delegates cannot delegate], and the agency is generally a personal trust and confidence which cannot be delegated; for the principal employs the agent from the opinion which he has of his personal skill and integrity, and the latter has no right to turn his principal over to another, of whom he knows nothing.

2 *Commentaries on American Law* 633 (1827).

Justice Story further described this common law rule as:

> One, who has a bare power or authority from another to do an act, must execute it himself, and cannot delegate his authority to another; for this being a trust or confidence reposed in him personally, it cannot be assigned to a stranger, whose ability and integrity might not be known to the principal, or, if known, might

> not be selected by him for such a purpose. . . . The reason is plain; for, in each of these cases, there is an exclusive personal trust and confidence reposed in the particular party. And hence is derived the maxim of the common law; *Delegata potestas non potest delegari* [Delegated power may not be delegated].

Commentaries on the Law of Agency § 13 (1839).

There are exceptions to the common law doctrine prohibiting subdelegations. One exception is for ministerial acts. *See Mason v. Joseph* [1804], 1 Smith 406 (KB) ("[He] cannot delegate his authority to a third person. He must exercise his own judgment on the principal subject, for the purpose of which he is appointed; but as to any mere ministerial act, it is not necessary that he should do it in person, if he direct it to be done, or, upon a full knowledge of it, adopt it."). This exception will become very important for delegations concerning questions of fact.

The Court, in *Marbury v. Madison* (1803), laid out what is required for an action to be ministerial:

> [T]he subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the President. . . . This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible [courses]; but is a precise course accurately marked out by law, and is to be strictly pursued. . . . It is a ministerial act which the law enjoins on a particular officer for a particular purpose.

5 U.S. 137, 158.

The key distinction of a ministerial act is that it gives no choice once the preconditions are satisfied—it

must be performed. Some judgment or wisdom may be necessary to determine if the preconditions have been satisfied, but that isn't the kind of judgment which involves discretionary power. When the duty of an officer just depends on the occurrence of a fact, the obligation of the officer is still a ministerial duty and can be subdelegated. It has long been considered the case that all public offices involving judgment or discretion are prohibited from delegating their duties. Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 567 (1890).

That agency law is the basis of the limitation on subdelegation of legislative power is reinforced by early state supreme court decisions applying this doctrine. *See, e.g., Marr v. Enloe,* 9 Tenn. (1 Yer.) 452, 453 (1830); *People ex rel. Caldwell v. Reynolds,* 10 Ill. (5 Gilm.) 1, 11 (1848).

Many of the state supreme courts cited the trust, discretion, or judgment placed in legislators' hands as prohibiting subdelegation, the same conditions prohibiting subdelegation under the common law of agency. *See, e.g., State v. Field,* 17 Mo. 529, 533 (1853) (describing the prudence and wisdom required of legislators as prohibiting subdelegation); *Moore v. Allen,* 30 Ky. (7 J.J. Marsh.) 651, 652 (1832) (describing a "personal trust" that could not be subdelegated).

Many of these cases explicitly referred to the Latin maxim cited by Justice Story above—"*Delegata potestas non potest delegari*" [Delegated power may not be delegated]. *See, e.g., Parker v. Commonwealth,* 6 Pa. 507, 515 (1847); *Thorne v. Cramer,* 15 Barb. 112, 116 (N.Y. Gen. Term 1851); *Franklin Bridge Co. v. Wood,* 14 Ga. 80, 83 (1853).

The reason for this common law rule, according to the state supreme courts, was the threat of abuse. In the words of one court, "faithless legislators anxious to escape the responsibility of their position" would abuse delegations. *Field*, 17 Mo. at 533. The highest court in New York held that a person doesn't have to become a legislator, but if he does,

> he takes it with all its duties and responsibilities; and, as a true and faithful agent, he cannot shrink from meeting and discharging them. And, above all, he cannot delegate to others the trust which has been expressly confided to him, by reason of his supposed knowledge and sound judgment. *Delegata potestas, non potest delegati*, is a settled maxim of the common law, in full force at the present day; and never more applicable than to the case of a legislator.

Thorne, 15 Barb. at 116.

The first legislative debate concerning the nondelegation doctrine occurred in 1798. The House of Representatives was considering a bill to delegate to the President the power to raise an army "whenever he shall judge the public safety shall require." 8 Annals of Cong. 1631 (Joseph Gales, ed. 1798). As Rep. Richard Brent reportedly described it:

> Congress, then, in whom alone the Constitution has placed the power of raising armies, will be deprived, during that time, of that power. And if Congress have the power of divesting themselves of this right, and transferring it for six years, they may do it for ten years or for a term equal to the existence of the Constitution.

> But he did not believe they had the power of making this transfer.

Id. at 1638. "No person has said Congress could not authorize the President to raise an army for the defence of the country; but it was denied that the power could be transferred from Congress to him, to determine whether it should or should not be raised." *Id.* at 1649.

Rep. Abraham Gallatin recognized:

> [T]he principle of the Constitution is, that no department of Government can exercise that power which has been given to another department. Gentlemen, however, seem to suppose the Constitution may remain inviolate so long as there is no forcible assumption of power by any branch of Government from the other, and that a transfer or free gift of such power would not be a violation of the Constitution. He considered the effect to be precisely the same whichever way it was done. The object of the Constitution was to assign forever certain specific Legislative powers to Congress, and certain other powers to the Executive, and whenever one department shall exercise the powers of the other, in whatever way it shall be done, the Constitution will be broken, and the security intended by it will no longer exist.

Id. at 1655.

He called this delegation a "dangerous principle, and if once admitted, it would be in the power of Congress to destroy the Constitution." *Id.* at 1656.

Some members said it was an "improper time to mention Constitutional scruples; that this was a time for acting," but Rep. William Claiborne rejected this proclaiming that

> [T]he Constitution, that palladium of our rights, never could be too sacredly guarded, and this of all others is the proper time to take care it is not invaded. In times of tranquillity, Congress do not feel disposed to surrender their authority; but when danger approaches, and alarm is everywhere gone abroad. Then it is that Congress may be most likely to be prevailed on to give up powers to the Executive, from an idea of promoting the public good, (but which may prove its greatest misfortune,) which, at other times, they would hold with the greatest tenaciousness.

Id. at 1653.

Claiborne's warnings are eerily accurate to what occurred during World War II, as will be shown in Part III below.

Two amendments were proposed to fix the constitutionality of the bill. One would have stricken the delegation entirely, and the other limited it to "the event of a declaration of war against the United States, or of actual invasion of their territory by a foreign Power, or of imminent danger of such invasion, discovered, in his opinion, to exist." *Id.* at 1631.

Rep. Charles Pinckney said "all must be agreed" that the powers of government cannot be "assigned or relinquished." *Id.* at 1660. But the dispute was over applying that principle to the latter amendment, which made it conditional on "certain contingences" in

which "every Constitutional objection must fall to the ground." *Id.*

In making the argument for the latter amendment, Rep. Harrison Otis said, "Wherever absolute power was invested, there could be no doubt [that it was unconstitutional] but that power might be executed upon a condition." *Id.* at 1641. He noted that "all the three contingencies [are] perfectly definite in their nature" and would instead make "the raising of the army depend upon certain contingencies, to be judged of by the President." *Id.*

Striking the entire delegation was defeated, *id.* at 1682, but so was the delegation to the President to raise an army as "public safety shall require." *Id.* at 1684. Instead the authority was limited to being conditioned on specific factual circumstances of a declaration of war or an actual or imminent invasion. *Id.* at 1689. The Fifth Congress rejected the constitutionality of delegating vague policy questions, while also affirmatively accepting the constitutionality of delegating specific factual determinations.

It is sometimes claimed that the nondelegation doctrine is dead in the modern era because it has not been used to strike down federal statutes. However, this Court has acknowledged that it enforces the nondelegation doctrine primarily through the canon of constitutional avoidance. *Mistretta v. United States*, 488 U.S. 361, 374 n.7 (1989) ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."). In this

way the nondelegation doctrine is actively enforced by the Court even if no statute is ruled unconstitutional.

It is also worth considering the phrase "office of trust" which is used in the Impeachment Clause, U.S. Const. art. I, § 3, and the Emoluments Clause, U.S. Const. art. II, § 1, and the Ineligibility Clause, U.S. Const. art. I, § 6, cl. 2. There is a common law distinction between a ministerial office and an office "of trust." The latter involves the use of discretion or judgment and thus it cannot be delegated. *King v. Alice Stubbs and others* [1788] 2 T. R. 395, 402 (KB) ("[A]n office of trust cannot be assigned; neither can it be executed by a deputy, unless power be expressly given for that purpose."). Sir William Blackstone distinguished "offices of public trust" from "ministerial offices" as only the latter "may be executed by deputy." 2 Blackstone, *Commentaries on the Laws of England* 36 (1753). As the office of a legislator involves such discretion and judgment, it is an office of trust that cannot be delegated. This is further evidence of how the law of agency limits delegation in the text of the Constitution.

B. The Delegation of Lawmaking to the Executive Was, According to Blackstone, "The Most Despotic Tyranny" and "Fatal to the Liberties of This Kingdom"

The prohibition on subdelegations of power did not originate in the Founding era. This principle was first confirmed by the famous English jurist Henry de Bracton in his *De Legibus et Consuetudinibus Angliae* (1268). Bracton wrote that "delegated jurisdiction cannot be delegated." 1 *De Legibus et Consuetudinibus Angliae* 443 (Sir Travers Twiss trans., Kraus 1964).

The King could only make law through Parliament. This principle was well accepted until the despotism of the Tudor monarchs. When one of them, King Henry VIII, began to issue proclamations without regard for existing statutes, many judges objected. *See* Sir John Baker, *Human Rights and the Rule of Law in Renaissance England*, 2 Nw. U.J. Int'l Hum. Rts. 3, 6 (2004). In response to their objections, the King pressured Parliament to pass the Proclamation by the Crown Act (1539). *Id.*; 31 Hen. VIII c. 8. This Act made the proclamations of the Crown "as though they were made by act of parliament." 31 Hen. VIII c. 8. While the Act was intended to legitimize the proclamations, it was limited so that it could not harm "any person's inheritance, offices, liberties, goods, chattels or life." *Id.* But even with these limitations, Parliament soon realized it was a mistake and repealed it. *See* 1 Edw. VI 6. c. 12. § 4 (1547).

Shortly before the American Revolution, several English jurists commented on the tyrannical nature of this statute. Sir William Blackstone described it as "a statute, which was calculated to introduce the most despotic tyranny; and which must have proved fatal to the liberties of this kingdom, had it not been luckily repealed." 1 *Commentaries on the Laws of England* *271 (1765). David Hume described it as "a total subversion of the English constitution." 4 *The History of England from the Invasion of Julius Caesar to the Revolution in 1688* 196 (1789). Thomas Bever, an English scholar at Oxford, wrote that "[s]uch an unnatural scheme was indeed really affected, for a short time, in the bloody and tyrannical reign of Henry VIII, when the parliament, awed into subjection by the frowns of a monster, passed a kind of *'lex regia'* in those unpopular and disgraceful statutes, wherein the king's

proclamations were indulged with the full force of regular laws." *A Discourse on the Study of Jurisprudence and the Civil Law* 22 (1766).

Even after the Proclamation by the Crown Act was repealed, the Tudor monarchs continued issuing proclamations that purported to establish crimes unsupported by statutes. The House of Commons objected to a proclamation by the King prohibiting new buildings in London upon his own authority, and Sir Edward Coke, Chief Justice of the King's Bench, was asked to rule on the legality of the proclamation. *Case of Proclamations*, 77 ER 1352 (1611). Coke and his fellow judges ruled that "the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm. . . . also the King cannot create any offence by his prohibition or proclamation, which was not an offence before, for that was to change the law, and to make an offence which was not . . . ergo, that which cannot be punished without proclamation, cannot be punished with it." *Id.* As such, he held that the proclamation at issue was "utterly against law and reason, and for that void." *Id.*

It is upon this history that John Locke, one of the most influential of Enlightenment thinkers, wrote:

> The legislative cannot transfer the power of making laws to any other hands. For it being but a delegated power from the people, they, who have it, cannot pass it over to others. . . . And when the people have said, We will submit to rules, and be govern'd by laws made by such men, and in such forms, no body else can say other men shall make laws for them; nor can the people be bound by any laws but such as are

> enacted by those, whom they have chosen, and authorised to make Laws for them. The power of the legislative being derived from the people by a positive voluntary grant and institution, can be no other, than what the positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands.

Second Treatise of Civil Government, Chap. XI (1690).

It is here that Locke makes the explicit link between the "delegated power from the people" and the doctrine that the "legislative can have no power to transfer their authority of making laws, and place it in other hands." *Id.*

II. THE LEGISLATIVE VESTING CLAUSE IS VIOLATED WHEN ANYONE OTHER THAN CONGRESS HAS DISCRETION OVER THE RULES OF PRIVATE CONDUCT UNDER FEDERAL LAW

To apply agency law to the Legislative Vesting Clause first requires defining the terms used. The three types of governmental powers correspond to the temporal focus of the power: Legislative powers are prospective, focusing on what future private conduct violates the law; while judicial powers are retrospective, focusing on whether past private conduct violated the law. *See Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 311–12 (1994) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.") (quoting *United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982)). Executive powers are focused on the present and concern the day-

to-day operations of government including who should currently be arrested or prosecuted. Only delegations concerning rules of private conduct involve legislative powers and could potentially violate the Legislative Vesting Clause.

Critics of the nondelegation doctrine claim that there cannot be a prohibition on discretionary delegation by Congress because the President must be able to delegate the power to prosecute or arrest people. Cynthia R. Farina, *Deconstructing Nondelegation*, 33 Harv. J.L. & Pub. Pol'y 87, 92 (2010). This misunderstands what has been delegated to the President. It assumes that all executive powers, such as the power to arrest or prosecute, have been delegated to the President, but, as shown directly below, this isn't what the text of the Constitution says. *See* Dina Mishra, *An Executive-Power Non-Delegation Doctrine for the Private Administration of Federal Law*, 68 Vand. L. Rev. 1509, 1532–33 (2015).

To begin with, the powers delegated to the different branches of government are not all the same in scope. The Constitution vests Congress with powers in the plural ("all legislative *powers* herein granted"). *Id.* In contrast, the executive and judicial branches are delegated power in the singular ("the executive *power*" and "the judicial *power*"). *Id.*

Instead of delegating all powers of an executive nature, "the executive power," as the Court defined it in *Myers v. United States*, 272 U.S. 52, 163–64 (1926), is "the general administrative control of those executing the laws." "The executive power" embodies the ultimate control over all officers using powers of an executive nature. Many executive powers, such as the power to arrest or prosecute, are not delegated to the

President through the Executive Vesting Clause. Those powers are exercised by officers other than the President, but the Executive Vesting Clause requires the President to remain in control of these officers.

In contrast, because Congress is delegated "all legislative powers herein granted," all federal legislative powers involving substantial judgment and discretion cannot be subdelegated by Congress to any other officer. *See infra* Part I.A. As will be shown below, ministerial duties, such as the determination of certain facts, do not involve substantial discretion and judgment, and so delegating such duties does not violate the Legislative Vesting Clause.

A. It Is Permissible to Delegate Factual Determinations that Do Not Involve Judgment or Discretion

Congress was designed to be in session only for a limited period of time before it would adjourn *sine die*, when members of Congress would return to their home state for several months. Conditions could change during the time in which Congress was not in session. Conditional legislation—legislation that depended on some future event occurring before it would become effective—was a solution to this problem.

Conditional legislation is designed to solve certain rule-of-law problems. It may be difficult to determine if a given event has occurred. This creates an indeterminacy in the law that can hamper the ability of people to plan their actions to comply with the law. Some may decide, out of an abundance of caution, to avoid potentially illicit acts just in case they may violate the law. But unless and until the condition specified in the law has been satisfied, burdening such activities is not the law's intention. Thus, beginning

with the First Congress, the law has sometimes required the President to proclaim that certain factual circumstances upon which the law is conditioned have occurred, so that everyone is on notice of what the law requires of them. But does the President's power to do this constitute an impermissible delegation? As shown directly below, the answer is no, and this is because it is merely a ministerial duty conditioned on a factual occurrence.

The Court first considered the nondelegation doctrine's application to such conditional legislation in *Cargo of the Brig Aurora v. United States* (1813). 11 U.S. (7 Cranch) 382. The plaintiff claimed that "Congress could not transfer legislative power to the President; to make the revival of a law depend upon the President's proclamation, is to give to that proclamation the force of law." *Id.* at 386. The government responded that "the legislature did not transfer any power of legislation to the President. They only prescribed the evidence which should be admitted of a fact, upon which the law should go into effect." *Id.* at 387. The Court held that the legislature could "exercise its discretion in reviving the act . . . either expressly or conditionally, as their judgment should direct." *Id.* at 388. Although the Court did not expressly state why this was valid, it presumably accepted the government's contention that the President was merely ascertaining the existence of a fact. As the Court would later describe this, "the suspension was absolutely required when the [P]resident ascertained the existence of a particular fact." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693 (1892). As such, this was a ministerial duty whose performance requires no discretion.

In *Field v. Clark*, the Court again addressed the nondelegation doctrine in a case very similar to *The Brig Aurora*, in that both concerned whether a presidential proclamation could increase tariffs. The Court reaffirmed the nondelegation doctrine—namely, that "Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Id.* at 692. As in *The Brig Aurora*, the Court viewed this as valid conditional legislation, but went into greater detail explaining why: "Nothing involving the expediency or the just operation of such legislation was left to the determination of the President." *Id.* at 693. This was valid conditional legislation because the President had "no discretion" and merely "ascertained the existence of a particular fact" on which Congress had made the statute depend. *Id.* The delegation of a ministerial duty—one that does not involve discretion and judgment—to determine a fact does not violate the Legislative Vesting Clause. On the other hand, "expediency" or "just operation" are examples given by the Court of legislative policy decisions that cannot be delegated. *Id.*

This is further illustrated by *J.W. Hampton*, in which Congress decided to impose a tariff to equalize the differences in the cost of production between the United States and foreign countries. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 404 (1928). Congress required the President to announce the "differences in costs of production in the United States and the principal competing country." *Id.* at 401. The Court described the facts that the President was to announce as "perfectly clear and perfectly intelligible." *Id.* at 404. The President was to use investigators in

"obtaining needed data and ascertaining the facts justifying readjustments." *Id.* at 405. Determining these facts may not have been a simple task, but it did not rely on the discretion or judgment of the President to do what he thought best.

Some commentators wrongly think that *J.W. Hampton* somehow changed or rejected the nondelegation doctrine. *See, e.g.*, David Schoenbrod, *Power Without Responsibility* 35 (1993). This is incorrect. Indeed, *J.W. Hampton* is yet one more example of applying the same rules as *The Brig Aurora* and *Field v. Clark*.

The Court in *J.W. Hampton* explicitly endorsed the classic nondelegation doctrine with the same words used by Justice Story: "The well known maxim '*delegata potestas non potest delegari*,' applicable to the law of agency in the general and common law, is well understood, and has had wider application in the construction of our federal and state constitutions than it has in private law." *Id.* at 405–06. The Court made clear that "discretion as to what [the law] shall be" cannot be delegated to the executive branch. *Id.* at 407. Instead, only the "application of such rules to particular situations and the investigation of facts" can be delegated to the executive. *Id.* at 408.

J.W. Hampton was the first case to mention an "intelligible principle" in discussing valid delegation. *Id.* at 409. This was nothing more than what was expressed earlier in the case: there must be a way of deciding if facts meet the legal standard set by Congress without discretion. Only Congress may set the standard; after that, the executive must determine whether the facts meet that standard. Crucially, however, "nothing involving the expediency or just

operation of such legislation was left to the determination of the President." *Id.* at 410. In short, the Court's judgment in *J.W. Hampton* is perfectly consistent with *The Brig Aurora* and *Field*.

In *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), the Court applied the exact same principles concerning conditional legislation to strike down a provision of the National Industrial Recovery Act. This case is still good law and is the closest case to the issue presently before the Court. The Court recognized that "authorizations given by Congress to selected instrumentalities for the purpose of ascertaining the existence of facts to which legislation is directed have constantly been sustained." *Id.* at 426. But with respect to that provision, the Court held that it "does not state in what circumstances or under what conditions the President is to prohibit the transportation" of petroleum products. *Id.* at 415. It "does not require any finding by the President as a condition of his action." *Id.* In other words, "Congress did not declare in what circumstances that transportation should be forbidden, or require the President to make any determination as to any facts or circumstances." *Id.* at 418. This doomed the provision, and the Court held it unconstitutional. *Id.* at 433.

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), was almost identical to *Panama Refining Co.* Both concerned the National Industrial Recovery Act, although different provisions were involved. The Court held that "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable." *Id.* at 537–38. It

would have been constitutional had it "undertake[n] to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure," but that is not what this statute did. *Id.* at 541. "Instead of prescribing rules of conduct, it authorize[d] the making of codes to prescribe them" and due to the "*discretion* of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. . . . [A]uthority thus conferred is an unconstitutional delegation of legislative power." *Id.* at 541–42 (emphasis added)

In short, the Court recognized the power of Congress to delegate the ministerial duty of determining a fact to the executive. Such delegations cannot involve discretion that is not bound by factual determinations.

III. THE COURT'S WORLD WAR II CASES MISAPPLIED PRECEDENT TO ALLOW IMPERMISSIBLE DELEGATIONS

As discussed above, prior to the World War II, Congress and the Courts required that the facts to be determined by the executive be set by Congress. But during the World War II era, the Court allowed the President to not only determine facts, but also to judgmentally select the facts on which policy is based. This doctrine undermined the strict separation of powers that had existed before by allowing delegation of substantial discretion.

The basis for this began, innocently enough, with two earlier cases on the management of federal lands. The Court reached the right result in those cases, but failed to explain the limitations of its reasoning.

In *Union Bridge Co. v. United States*, Congress had delegated to the Secretary of War the power to determine whether a bridge over the waters of the United States, which is federal property, was an "unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise." 204 U.S. 364, 366 (1907). Likewise, in *United States v. Grimaud*, Congress had delegated to the Secretary of Agriculture to make "rules and regulations" over harvesting federal forest reserves. 220 U.S. 506, 509 (1911).

The Court cited *Wayman v. Southard*, 23 U.S. 1 (1825), concerning the ability to delegate the power to "fill up the details." *Grimaud*, 220 U.S. 506 (1911). But the Court did not mention the limitation that certain subjects "must be entirely regulated by the legislature itself." *Wayman*, 23 U.S. at 43. Rules concerning federal land could be delegated under such general provisions, but rules of private conduct on private land "must be entirely regulated by the legislature itself." *Id.*

The nondelegation doctrine does not apply to Congress' power over federal land. In fact, Congress has, starting in 1787 with the Northwest Ordinance, explicitly delegated completely discretionary legislative power to territorial governments within the territory owned by the federal government. 1 Stat. 50. ("The governor and judges, or a majority of them, shall adopt and publish in the district, such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district."). The Northwest Ordinance was enacted in the middle of the Constitutional Convention (it was re-enacted after the Constitution was ratified) and the

Territory Clause, U.S. Const. art. IV § 3 cl. 2, was specifically designed to allow Congress to dispose of such territory by, among other things, the delegation of "rules and regulations." James Madison even commented that the Northwest Ordinance was "without the least color of constitutional authority" prior to the adoption of the Constitution. *The Federalist No. 38* (James Madison). In short, the nondelegation doctrine does not appear to apply within federally owned land, due to the Territory Clause's explicit authorization, and so delegations can be made by Congress pursuant to only general provisions.

Union Bridge Co. and *Grimaud* were thus correctly decided. But during World War II these precedents were applied to cases that did not involve federal land.

One such case was *Yakus v. United States*, 321 U.S. 414 (1944). In the Emergency Price Control Act of 1942, Congress had, as a temporary wartime measure, delegated to the Price Administrator the power to set maximum prices on all commodities and rents. *Id.* at 419. Although the administrator was required to give "due consideration" to prior prices, he was not bound by them and could "make adjustments for such relevant factors as he may determine." *Id.* at 421.

In *Yakus*, the Court, for the first time, accepted delegations of the power to judgmentally select the facts on which policy is based. *Id.* at 424 (holding the Constitution "does not require that Congress find for itself every fact upon which it desires to base legislative action"). The Court noted that it is the "legislative function" to set the "binding rule of conduct" but that in this case the rule was to obey the Price Administrator. *Id.* Such a rule, if it were the only

limitation, would allow the delegation of all legislative powers to the executive, but the Court did not acknowledge this. Instead, it rejected the idea that a statute "call[ing] for the exercise of judgment" by the executive would violate the Constitution. *Id.* at 425. While nominally accepting the prohibition on delegating legislative powers, the Court allowed precisely what the nondelegation doctrine prohibits.

It is perhaps understandable that *Yakus* deviated from the constitutional requirements. It was issued in the middle of World War II, within months of D-Day. The statute concerned temporary emergency regulation to provide for the war effort. For similar reasons, the Court upheld the blanket delegated authority to determine the undefined term "excessive profits" in another World War II case, *Lichter v. United States* (1948). 334 U.S. 742, 783. In doing so, the Court went well beyond the prior limitations on delegated power while emphasizing the need to support the war effort.

As with *Korematsu v. United States*, 323 U.S. 214 (1944) (allowing the internment of Japanese Americans), we should recognize these cases as war-related deviations from constitutional requirements.

It is in this light that the Court should look at *Yakus, Lichter,* and *Korematsu*, as precedents that at the time were viewed as necessary to preserve the nation, but which, upon further reflection, should be seen as unconstitutional.

IV. SORNA UNCONSTITUTIONALLY DELEGATES DISCRETIONARY LEGISLATIVE POWER TO THE ATTORNEY GENERAL

34 U.S.C. § 20913(d) delegates to the Attorney General is delegated the authority to decide if any provision, or no provision, of the Sex Offender Registration and Notification Act applies to sex offenders convicted prior to the enactment of this Act. 34 U.S.C. § 20913(d). Additionally, the Attorney General is delegated the authority to "prescribe rules for the registration of any such sex offenders" which may be the same or different than any provision of the Act. *Id.*

There are no facts that the Attorney General is required to determine for the applicability of these provisions to any such person. The statute gives blanket authority to the Attorney General to provide for whatever rules of conduct he chooses, unrestricted by any factual preconditions.

In *United States v. Nichols*, 784 F.3d 666 (10th Cir. 2015), Justice Gorsuch, then on the 10th Circuit, considered the very statutory provision at issue in this case. Justice Gorsuch would have correctly struck down the statute, and he accurately described what the common law requires:

> [T]hree "meaningful" limitations emerge: (1) Congress must set forth a clear and generally applicable rule . . . that (2) hinges on a factual determination by the Executive . . . and (3) the statute provides criteria the Executive must employ when making its finding.

Id. at 673 (Gorsuch, J., dissenting from the denial of rehearing *en banc*).

But Justice Gorsuch applied such a standard only to a "delegation challenge in the criminal context." *Id.* While it is true, as Justice Gorsuch noted, that "the law routinely demands clearer legislative direction in the criminal context than it does in the civil," *id.* at 673, this doesn't apply in this context. Neither the Constitution nor the common law makes the nondelegation doctrine more applicable in a criminal context. Congress is delegated "all legislative powers herein granted," not all penal legislative powers. As Justice Gorsuch recognized recently:

> Ours is a world filled with more and more civil laws bearing more and more extravagant punishments. Today's "civil" penalties include confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken, remedies that strip persons of their professional licenses and livelihoods, and the power to commit persons against their will indefinitely. Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies.

Sessions v. Dimaya, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring).

If a person hasn't broken the law, as set by Congress, then taking his property violates the Constitution just as much as taking his liberty. *The Brig Aurora*, the very first case in which the Supreme Court considered the nondelegation doctrine, and *Field v. Clark* were both civil actions having no person's liberty at stake and yet the nondelegation doctrine was just as applicable there. The Court should resist the temptation to apply a stricter

standard in the criminal context and instead apply the nondelegation doctrine to all cases as the Constitution requires. If not this, then it should at least expressly reserve the question of the doctrine's application in the civil context so that lower courts can consider it.

To the extent that the Court considers *Yakus*, *Lichter*, and similar cases applicable to the instant case, it should overturn them. It is not necessary to overturn these cases to decide this case, as this case could be decided on narrower grounds, but doing so would bring clarity to lower courts. This line of cases is beyond the limited ministerial duties that the Founders understood could be validly delegated.

As there is no limitation on the Attorney General's authority to issue the challenged binding rules of private conduct, the Court should strike down 34 U.S.C. § 20913(d) as violating the Legislative Vesting Clause.

CONCLUSION

For the foregoing reasons, this Court should hold that 34 U.S.C. § 20913(d) is unconstitutional as it violates the nondelegation doctrine.

Respectfully submitted,

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IN THE

Supreme Court of the United States

HERMAN AVERY GUNDY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

Brief *Amicus Curiae* of Downsize DC Foundation, DownsizeDC.org, Free Speech Coalition, Free Speech Defense and Education Fund, U.S. Constitutional Rights Legal Defense Fund, Public Advocate of the United States, Gun Owners Foundation, Gun Owners of America, Conservative Legal Defense and Education Fund, and Restoring Liberty Action Committee in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

Downsize DC Foundation, Free Speech Defense and Education Fund, U.S. Constitutional Rights Legal Defense Fund, Gun Owners Foundation, and Conservative Legal Defense and Education Fund are nonprofit educational and legal organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(3). DownsizeDC.org, Free Speech Coalition, Public Advocate of the United States, and Gun Owners of America are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Restoring Liberty Action Committee is an educational organization. These organizations were established, *inter alia*, for purposes related to participation in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

STATEMENT

Congress's effort to usurp the police power of the states with respect to sex offenders, through the federal Sex Offender Registration and Notification Act ("SORNA"), 120 Stat. 590, has been before this Court on two prior occasions.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

In Carr v. United States, 560 U.S. 438, 441 (2010), this Court determined, as a matter of statutory construction, that the criminal offense of failure to register under 18 U.S.C. § 2250 did not apply to sex offenders whose interstate travel occurred prior to SORNA's effective date.

And in Reynolds v. United States, 565 U.S. 432, 435, 441 (2012), this Court determined that the Act's registration requirements do not apply to persons convicted before the statute's enactment, a holding that was overridden by regulations issued by the Attorney General specifying that they must register. The Court "express[ed] no view on Reynolds' related constitutional claim" based on the nondelegation doctrine. *Id.* at 441. That issue is now before the Court, which granted certiorari to decide "[w]hether SORNA's delegation of authority to the Attorney General to issue regulations under 42 U.S.C. § 16913(d)[2] violates the nondelegation doctrine."[3]

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[2] The statute cited in the issue presented has been transferred to 34 U.S.C. § 20913(d), and states: "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b)."

[3] In the past, the creation and preservation of lists of American citizens have proven to be dangerous when in the hands of government. That is one of the reasons why Congress has prohibited the Bureau of Alcohol, Tobacco, Firearms and Explosives from setting up a centralized database of gun owners. *See* 18 U.S.C. § 923 Note (Pub. L. No. 112-55). Additionally, U.S.

SUMMARY OF ARGUMENT

America's law students are taught that the federal government in Washington, D.C. is a government of separated powers — legislative, executive, and judicial. The question in this case is whether the federal government is truly one of separate powers, or one in name only. Stated another way, having vested separate powers in the separate branches — legislative in Congress, executive in the President, and judicial in the courts — will those divisions be honored by the federal government, so that the People may enjoy the blessings of liberty promised by the nation's founders in creating that structure.

If this Court decides this case according to the constitutional text and context at the time that the Constitution was written, there is no doubt that Congress has unconstitutionally ceded its legislative powers to the Attorney General, by authorizing a member of the executive department to deliberate and

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census information was revealed to have been improperly used during World War II for the apprehension and detention of Japanese-American citizens, a use apparently unknown to this Court when it approved those detentions. *See* Korematsu v. United States, 323 U.S. 214 (1944); L. Aratani, "Secret use of census info helped send Japanese Americans to internment camps in WWII," *Washington Post* (Apr. 3, 2018). Three decades later, the Select Committee to Study Government Operations' (Church Committee) Report on "Intelligence Activities and the Rights of Americans," revealed that "At least 26,000 individuals were at one point catalogued on an FBI list of persons to be rounded up in the event of a 'national emergency.'" Final Report (Apr. 14, 1976) Book II at 7.

enact the rules governing those persons in our civil society who are required to register with the government as a sex offender. After all, the very nature of legislative power is to make the rules of "civic conduct," and that power is vested in Congress, not the Attorney General who works for the President, and who in turn is vested with executive power, *i.e.*, to "carry into effect" those rules. Bound by the Constitution's government of separated powers, Congress cannot pass the legislative baton to the Attorney General in disregard of the bicameral and presentment principles of Article I, Section 7 which contemplate that, before a bill can become law, it must first be adopted by Congress, not by the President, and much less by the unelected head of the executive Department of Justice.

For a period of nearly 80 years, however, this salutary procedure by which a bill becomes law has been undermined by a pragmatic compromise. No longer is Congress required to make the rules. All it need do is enact an "intelligible principle," and the executive department can then be tasked not only to make the rules, but to superintend itself to make sure that they are carried out. According to the "intelligible principle" test, all the government need do is provide a sensible reason for the merging of legislative and executive powers, to carry out as broad of a stated policy objective as Congress chooses, leaving the details to the various unelected and unaccountable executive departments, agencies, bureaus, and commissions to fill in the gaps. In truth, the "intelligible principle" is neither "intelligible" nor "principled." Rather, it is bankrupt because it fails to

serve the purpose of a written constitution to actually limit the powers that the People have conferred upon their governors, lest their liberties be lost.

The separation of powers among the branches must not be viewed as an historical relic of a simpler age. The need to separate powers to limit government has been studied for at least 2,300 years, with deep roots in the revelation of Scripture about the sinful nature of man, the different functions associated with law, and the division of offices which God established for the nation Israel. The Founders understood these principles and developed a structure of government which embodied them, to the end that government would be limited, and the liberty of the People would be protected and preserved.

The delegation of legislative power to the Attorney General in this case is particularly problematic. First, there were no intelligible principles to be applied. Second, the executive officer who was delegated legislative power to create the crime here is the same officer responsible to enforce federal criminal law. Third, the case involves not any type of rule, but the creation of a crime which authorizes the federal government to deprive Americans of their liberty — a fearsome power that requires legislators to write those laws, and be directly accountable to the People. Lastly, the judicial branch cannot trust the political branches to enforce the constitution's structural protections. Elected legislators seek to avoid making tough decisions in order to avoid offending any group of voters, while the unelected bureaucrats of the executive branch seemingly cannot resist the

temptation to use any justification whatsoever to wield legislative power. The duty to protect the structure proposed by the Framers and ratified by the People now falls upon this Court.

ARGUMENT

I. BY VESTING THE LEGISLATIVE POWERS ENUMERATED IN THE CONSTITUTION TO CONGRESS, THE PEOPLE EMPOWERED CONGRESS, NOT THE ATTORNEY GENERAL, TO MAKE THE RULES OF CIVIC CONDUCT.

Petitioner contends that Sex Offender Registration & Notification Act ("SORNA") § 20913(d) "grants the Attorney General quintessentially legislative powers ...." Brief for Petitioner ("Pet. Br.") at 23. As is true of the other governmental powers vested by the Constitution — the executive (Article II, Section 2) and the judicial (Article III, Section 1) — the legislative power vested by Article I, Section 1 is not defined in the instrument. Although each power is distinct from the other — as attested by the tripartite division setting forth each of the three powers — one must look outside the written document for working definitions for each function.

At the time of fashioning of the Constitution, the distinctions among the three classes of governmental powers were commonly understood. Hence, in his 1828 American Dictionary of the English Language, Noah Webster summarized each of the three, noting their similarities and distinctions:

> the body that deliberates and enacts **laws**, is **legislative**; the body that judges or applies the **laws** to particular cases is **judicial**; the body or person who carries the **laws** into effect, or superintends the enforcement of them, is **executive**. [*Id.* at 76 (definition of "executive") (emphasis added).]

While all three powers are distinct, they all are defined in relation to "laws."

"Laws," in turn, are understood in their primary sense, to be "rules" relating to the "community in general." I W. Blackstone's Commentaries at 44. As Blackstone put it, the "laws" of a civil society are "rule[s] of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." *Id.* (internal quotations omitted). Applying this definition of "law" here, there can be no question that SORNA § 20913(d) empowers the Attorney General to exercise legislative power, "prescrib[ing] rules, backed by criminal sanctions, governing the conduct of roughly half a million private individuals, including petitioner." Pet. Br. at 23.

But there is more. If, by delegation of authority to the Attorney General in SORNA § 20913(d), Congress conferred no more than power to make rules governing the Attorney General's exercise of discretion in the enforcement of a Congressionally enacted rule, then there would have been no need to say so. Such executive discretion would be inherent in and ancillary to the Attorney General's exercise of his executive power, and such discretionary enforcement power need

not have been expressly reserved, much less delegated. *See* Mistretta v. United States, 488 U.S. 361, 416-19 (1989) (Scalia, J., dissenting). But that is not what occurred here. Congress deliberately chose to enlist the Attorney General to resolve the contentious debate between the House and the Senate over whether SORNA's registration requirements "'would apply to persons who had been convicted of qualifying sex offenses before SORNA's effective date.'" Pet. Br. at 7.

It is, however, the constitutional duty for Congress, as the nation's lawmaking branch, to "deliberate and enact" a proposed "rule" into law, not to appoint someone from the executive branch to resolve a policy impasse between the two houses of Congress. As the "enacter" of the laws, it is the province of the legislative branch to take the initiative, and it is for the executive and judicial branches to respond — the executive to "enforce" the law as enacted and the judicial to say what the law is.[4]

Hence, in a government of enumerated powers, the other branches are to wait until the legislative branch acts. Yet, by enacting SORNA § 20913(d), authorizing the Attorney General[5] to take the initiative to

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[4] *See* Osborn v. Bank of the United States, 22 U.S.738 (1824). Justice Marshall applied the law as it is written: "Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect ... to the will of the law." *Id* at 866.

[5] The problem of unlawful delegation is even clearer, as here, when the member of the executive branch appointed to write a criminal law is the same person charged with prosecuting that

determine whether SORNA should require all sex offenders to register, Congress passed the legislative baton to the executive, contrary to the limited role of the executive to "carry out" the law, not to "deliberate and enact" the law. To rule otherwise would undermine the carefully crafted procedural rules governing the order whereby a bill becomes a law, beginning with Congress — the legislative branch — and ending with the President — the executive branch. In this case, the government asks the Court (i) to dispense with the bicameral and presentment principles set out in Article I, Section 7 *(see* INS v. Chadha, 462 U.S. 919, 951 (1983)) and (ii) to disregard the natural order within which the three powers are exercised, as reflected in the Constitution's first three articles — legislative, executive, and judicial.

II. THE INTELLIGIBLE PRINCIPLE TEST IS BANKRUPT AND SHOULD BE ABANDONED.

As Petitioner points out in his brief, this Court devised the "intelligible principle" test to demarcate the distinction between "lawmaking" and "law-enforcing." The theory was to permit Congress to delegate some of its legislative function, because strict adherence to the Constitution's structure of separation of powers is allegedly impractical "'in our increasingly complex society, replete with ever changing and more technical problems.'" Pet. Br. at 26. But it is not for Congress or this Court to amend, or even to modulate,

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crime.

the Constitution to accommodate changing times. Rather, as Chief Justice Marshall reminds us in Marbury v. Madison, 5 U.S. 137 (1803), "the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness...." *Id.* at 176. And, because the people "can seldom act," the Chief Justice continues, the nation's foundational legal principles are "designed to be permanent." *Id.* Foremost among these permanent principles, the Chief Justice asserts, is the "organiz[ing] [of] the government, and [the] assign[ation], to different departments, their respective powers":

> It may either stop here; or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. [*Id.*]

Thus, Article I, Section 1 "vests" the legislative power in Congress, and nowhere else. How well has the "intelligible principle" test measured up as a meaningful balance on Congress's passing legislative functions on to some other department without shirking its duty to make the laws? As the Government has conceded, there have been only two cases in which a statute has failed the "intelligible principle" test, and both of those cases were over 80 years ago. Brief for the United States in Opposition ("U.S. Br.") at 23. That record should come as no surprise — not because Congress has been complying

with constitutional limits, but because the "intelligible principle" test is a test that almost no legislative delegation could fail. According to Webster, "intelligible" means "capable of being understood." "Sensible." Thus, the Government asserts that the basis of the SORNA delegation to the Attorney General is "intelligible" because Congress "'broadly set policy goals that guide the Attorney General,' and it 'created SORNA with the specific design to provide the broadest possible protection to the public, and to children in particular, from sex offenders.'" U.S. Br. at 23. What could be more sensible than that? Indeed, as the Eleventh Circuit in United States v. Ambert, 561 F.3d 1202 (11th Cir. 2009), opined, a "review of the legislative history ... confirms the broad purpose of the statute":

> that there were 100,000 to 150,000 sex offenders who were failing to comply with state registration requirements, that the situation was "killing our children," and that SORNA would "get tough" on those persons and decrease the number of sex offenders violating registration requirements. [*Id.* at 1214.]

In reality, the "intelligible principle" test itself cannot be taken literally, as it is neither "intelligible" nor "principled." Rather, as Justice Scalia has recounted: "The focus of controversy, in the long line of our so-called excessive delegation cases, has been whether the *degree* of generality contained in the authorization for exercise of executive ... powers in a particular field is so unacceptably high as to *amount* to

a delegation of legislative powers." Mistretta at 419 (Scalia, J., dissenting). Regardless of the stated purpose of the law, the bottom line is simply whether the Constitution requires Congress — not the Attorney General — to make the "fundamental legislative choices." Pet. Br. at 33.

> To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed. [Marbury at 176.]

III. SEPARATION OF POWERS — AN ESSENTIAL PREREQUISITE FOR A LIMITED NATIONAL GOVERNMENT.

The doctrine that powers must be divided and separated in order to protect the people from their government is generally attributed to Charles de Montesquieu, a French judge who developed that theory during the first half of the 18th Century, and who was much read and admired by the Framers. *See* Pet. Br. at 18. As Montesquieu observed, separation of powers is a necessary precondition to political liberty, where the people do not live in fear of those men then responsible for running their government:

> The **political liberty** of the subject is a tranquillity of mind arising from the opinion each person has of his **safety**. In order to have

> this liberty, it is **requisite** the government be so constituted as one man need not be **afraid** of another. [Montesquieu, The Spirit of Laws, Chap. VI (emphasis added).]

Conversely, when that separation is violated, particularly when the legislative and executive powers are joined, the people come to fear those men exercising governmental power, and liberty ceases to exist:

> When the legislative and executive powers are **united** in the same person, or in the same body of magistrates, **there can be no liberty**; because **apprehensions** may arise, lest the same **monarch** or **senate** should **enact** tyrannical laws, to **execute** them in a tyrannical manner. [*Id.* (emphasis added).]

However, Montesquieu was not the first political philosopher to speak to this issue, having developed, enhanced, and clarified the work of others writing over two millennia, including Aristotle, Polybius, and John Locke.[6] Moreover, it would be a mistake to ignore the Biblical underpinning of this doctrine. Holy Writ teaches the danger of entrusting power to any man, because of the sinful nature of man: "The heart is deceitful above all things, and desperately wicked: who can know it?" Jeremiah 17:9. Madison expressly

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[6] For a recent overview of both the history of the Separation of Powers Doctrine and jurisprudence in that area, see Department of Transportation, et al. v. Association of American Railroads, 575 U.S. ___, 135 S.Ct. 1225, 1240 (2015) (Thomas, J., concurring).

embraced this Biblical understanding of man in Federalist No. 51, writing: "If men were angels, no government would be necessary." G. Carey and J. McClellan, eds., The Federalist (Liberty Fund: 2001) at 269. However, since men are most decidedly not angels, Madison explained that:

> [i]n framing a government which is to be administered by **men over men**, the great difficulty lies in this: you must first **enable the government** to control the governed; and in the next place oblige it **to control itself**.[7] [*Id.* (emphasis added).]

Of course, spreading power and responsibility among individuals is not a principle unique to government, as:

> [t]his policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public.... These

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[7] There is an Old Testament teaching which is instructive here. Immediately after anointing Saul as king, the prophet Samuel established the first written constitution which would bind the new king: "Then Samuel told the people **the manner of the kingdom**, and wrote it in a **book**, and laid it up before the Lord. And Samuel sent all the people away, every man to his house." I Samuel 10:25 (emphasis added). Thus, Saul was not made king to rule as he wanted, but he was to serve under the limitations of God-ordained statutes. *See* Deuteronomy 17:18-20. King Saul failed to respect the limitations on his God-given authority, usurping the role of a priest in making a burnt offering, and for that usurpation of priestly authority, he lost his kingdom. *See* 1 Samuel 13.

> inventions of prudence cannot be less requisite in the distribution of the supreme powers of the state. [*Id.*]

One of the reasons that our nation has survived 229 years is that the Framers incorporated into the Constitution which they proposed for ratification a structure for the national government which recognized the inherent limitations of the people who would be entrusted to run that government — including both them and their successors. The illogic of trusting rulers more than the people was explained by Frederic Bastiat in 1850:

> [If] the natural tendencies of mankind are so bad that it is not safe to allow them liberty, how comes it to pass that the tendencies of these organizers are always good? Do not the legislators and their agents form a part of the human race? Do they consider that they are composed of different materials from the rest of mankind? [Frederic Bastiat, The Law (Von Mises Institute: 2007) at 46.]

More specific guidance as to precisely how governmental power should be divided can be drawn from Isaiah 33:22, which identifies three distinct ways in which God interacts with man with respect to the Law: "For the Lord is our **judge**, the Lord is our **lawgiver**, the Lord is our **king**; he will save us." (Emphasis added.) It is difficult to read this passage without understanding how it formed the pattern for

our federal constructional structure.[8] All attributes of sovereignty are seamlessly united in a perfect, holy, and just God, but could never be allowed to be united in the hands of one, or any group of sinful men. Indeed, echoing Montesquieu's analysis, Madison contended that the federal structure established by the Constitution was essential to preserve liberty for the people:

> The **accumulation of all powers, legislative, executive, and judiciary**, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced **the very definition of tyranny**. Were the federal constitution, therefore, really chargeable with this accumulation of power, or with a **mixture of powers**, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. [Federalist No. 47, at 249, *supra* (emphasis added).[9]]

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[8] Indeed, when the people of Israel rejected God's direct rule through judges, Moses and his successor judges exercised all three powers. The people asked for a king like all the nations, one with total power. *See* I Samuel 8. In his mercy, God gave the people a covenant king bound by he law, as promised in Deuteronomy 18, the legislative power remaining with God alone, the judicial power remaining in Samuel, the judge. I Samuel 7:15-17. Thus, the three powers were separated once Saul was made king.

[9] *See also* Pet. Br. at 18.

Sadly, the statute now under review demonstrates that the Constitution which Madison was defending has not served to prevent a "mixture of powers" from occurring — in that each branch has been unfaithful to the original plan. During the era of the intelligible principle test, the political branches have failed to preserve the constitutional structure. Under SORNA, one would have hoped that Congress would have been protective of its own prerogatives, declining to vest in the Attorney General the power to write a law. And, one would have hoped that a succession of Attorneys General would have refused to exercise discretionary legislative power. *See* Pet. Br. at 6-12. Finally, the third branch of government has also failed in enforcing Justice Scalia's high view of the importance of constitutional structure, when he said "[it] is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded." Mistretta v. United States at 415 (Scalia, J., dissenting).

Divine writ, verified by human experience, demonstrates that adherence to the structural protections of the Constitution is a necessary precondition for a free society to preserve "liberty," which Bastiat explained to be the result of "an act of faith in God and in His work." The Law at 55.

IV. THE JUDICIARY HAS A DUTY TO PROTECT AMERICANS FROM CRIMINAL SANCTIONS CRAFTED BY UNELECTED BUREAUCRATS.

It may be late in the day for this Court to return to the constitutional text, as the imprecise, if not deeply

flawed "intelligible principle" doctrine was adopted by this court nine decades ago in J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928). However, that is what needs to be done. Since Chief Justice Taft penned those words, that test has come to eclipse the relevant constitutional text in the minds of most justices and often lawyers as well. As lamented by Justice Thomas in a recent case asserting the nondelegation doctrine, "none of the parties to this case has examined the text of the Constitution or asked us to reconsider our precedents on cessions of legislative power." Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487 (2001) (Thomas, J., concurring). However, in this case, the petitioner's brief most certainly did not neglect the constitutional text, hopefully making this the "future day" referred to by Justice Thomas where he "would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers." *Id.* The foundational importance of preserving the separation of powers cannot be overstated.

Although it has been 83 years since a delegated power was struck down, in the recent past, this Court has checked the power of the executive to rely on a federal treaty, without any implementing congressional legislation, and to use it as the basis for a federal criminal prosecution of a local crime. *See* Bond v. United States, 564 U.S. 211 (2011) ("Bond I") and Bond v. United States, 572 U.S. ____, 134 S.Ct.

2077 (2014) ("Bond II").[10] In a decision by Chief Justice Roberts in Bond II, this Court concluded that the government's "sweeping reading of the statute would fundamentally upset the Constitution's balance" between the states and the federal government. The concurrence by Justice Scalia went further and advanced the view that Congress could not constitutionally federalize a purely local crime. *Id.* at 2094 (Scalia, J., concurring). The same situation obtains here.

Although these *amici* would urge the Court to go further, to turn completely away from current nondelegation doctrine and its unworkable "intelligible principle" test, at a minimum barring the executive from creating crimes would seem to be an easy case. In our system based on dual sovereignty, Congress has usurped the states' role in criminal law, a power that the national government was never designed to have.

Conspicuously absent from those "few and defined" powers[11] vested in the national government is a general police power, including the power to enact and enforce a generally applicable criminal code — a power reserved by the Tenth Amendment to the States. *See* The Federalization of Criminal Law 5-6 (ABA Task

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[10] Some of the *amici* in this case filed *amicus* briefs in each of the two Bond v. United States cases (in 2010 and in 2013).

[11] *The Federalist No. 45* ("The powers delegated by the proposed constitution to the federal government, are few and defined. Those which are to remain in the state governments, are numerous and indefinite.").

Force on the Federalization of Criminal Law: 1998) ("ABA Task Force Report").

The political branches cannot be relied on to protect the separation of powers, and for good reason. The political branches are highly political. The primary objective of any modern politician is simple — re-election. Difficult questions have constituencies on both sides and any decision necessarily makes some group unhappy. Therefore, the temptation for any incumbent politician is to find ways to avoid making a difficult decision whenever possible. *See generally* J. Miller, Monopoly Politics (Hoover Institute Press: 1999) at 89, 127-29.

When legislative decisions can be handed off to an appointed official who does not face the voters, the problem of re-election is solved — especially when the unelected bureaucrat can be counted on to carry out the private agenda of the legislator. Should his constituents call to complain about a new regulation, the congressman can simply explain: "I didn't make that decision. The experts did. And there is nothing I can do about it. Complain to them." For its part, the executive branch rarely resists the impulse to exercise legislative power. The result is that an unconstitutional delegation of legislative power actually serves the interests of both of the political branches, but harms the interests of the People.

In the past, Congress has been offered proposed legislation designed to prevent the unlawful delegation of its duties, but has had little appetite to pass such a law. Indeed, *amicus* DownsizeDC.org has developed

and promoted legislation which would provide a process to protect the separation of powers by requiring Congress, as the legislative body, to follow certain steps.[12] The bill would prohibit any delegation of legislative powers, including those which would create any civil or criminal liabilities, to any other branch or to any administrative agency. The bill was designed to implement the separation of power principles of Kilbourn v. Thompson, 103 U.S. 168 (1881), that the Constitution:

> has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of the government [and] the powers confided by the Constitution to one of these departments cannot be exercised by another. [*Id.* at 191.]

Although the Write the Laws Act was introduced once in the House and several times in the Senate, it attracted little support.[13]

This political reality cries out for this Court to step in to protect the structural framework mandated by the Framers and the People. And, this case should be

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[12] *See* DownsizeDC.org, The Official Text of Downsize DC's "Write the Laws Act" (WTLA), https://downsizedc.org/the-official-text-of-downsize-dcs-write-the-laws-act-wtla/.

[13] *See, e.g.*, H.R. 4343, "Write the Laws Act" (113th Congress) (Rep. Steve Stockman, R-TX); S. 1575, "Write the Laws Act" (114th Congress) (Sen. Rand Paul, R-KY).

an excellent vehicle by which to take a major step in textual restoration, as it raises perhaps the most serious type of delegation issue — congressional empowerment of the executive to criminalize otherwise lawful behavior, leading to the loss of liberty, and often property, of American citizens.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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In The
Supreme Court of the United States

HERMAN AVERY GUNDY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

Whether the Sex Offender Registration and Notification Act's delegation to the Attorney General in 34 U.S.C. § 20913(d) violates the constitutional nondelegation doctrine.

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A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) ..... *passim*

Am. Power & Light Co. v. SEC, 329 U.S. 90 (1946) 8, 27, 33

Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978) 11

Bond v. United States, 134 S. Ct. 2077 (2014) 31

Clinton v. City of New York., 524 U.S. 417 (1998) 35

Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225 (2015) 4, 31, 32, 36

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 34

FPC v. Hope Nat. Gas Co., 320 U.S. 591 (1944) 8

INS v. Chadha, 462 U.S. 919 (1983) 29, 36

J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928) 8

King v. Burwell, 135 S. Ct. 2480 (2015) 20, 34

Marshall Field & Co. v. Clark, 143 U.S. 649 (1892) 5, 35

Martin v. Hunter's Lessee, 1 Wheat. 304 (1816) 28

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 27

Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, 501 U.S. 252 (1991) 36

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Mistretta v. United States, 488 U.S. 361 (1989) 4, 28, 33

Morrison v. Olson, 487 U.S. 654 (1988) 2

Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943) 8, 9

Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) 27, 29

United States v. Baldwin, 745 F.3d 1027 (10th Cir. 2014) 14, 15, 16, 17

United States v. Evans, 333 U.S. 483 (1948) 16, 26, 35

United States v. Guzman, 591 F.3d 83 (2d Cir. 2010) 4

United States v. Matchett, 837 F.3d 1118 (11th Cir. 2016) 15

United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820) 6, 16

Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014) 34

Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) 9

Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825) ..... *passim*

Yakus v. United States, 321 U.S. 414 (1944) 8

Yates v. United States, 135 S. Ct. 1074 (2015) 21

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U.S. Const. art. I, § 8, cl. 3 ..... 29, 30
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45 C.F.R. § 3.42(a) 18
45 C.F.R. § 3.42(e) 19

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OTHER AUTHORITIES

A. J. Kritkos, *Resuscitating the Non-Delegation Doctrine: A Compromise and an Experiment*, 82 Mo. L. Rev. 441 (2017) 11

Amity Shlaes, The Forgotten Man (2007) ... 22, 23, 24, 25

Brookings Institution's Vital Statistics, *Congressional Workload, 30th-114th Congresses, 1947-2016*, https://www.brookings.edu/wp-content/uploads/2017/01/vitalstats_ch6_full.pdf 12

Code of Federal Regulations Total Pages and Volumes 1938-2017, FederalRegister.gov, https://www.federalregister.gov/uploads/2018/03/cfrTotalPages2017.pdf 13

Clyde Wayne Crews Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State, 2017 Edition*, Competitive Enterprise Institute, (2017), https://cei.org/sites/default/files/Ten%20Thousand%20Commandments%202017.pdf 13

Federal Register Pages Published 1936-2017, FederalRegister.gov, https://www.federalregister.gov/uploads/2018/03/pagesPublished2017.pdf 13

Gary Fields and John R. Emshwiller, *Many Efforts to Count Nation's Federal Criminal Laws*, Wall St. J., Jul. 23, 2011, https://www.wsj.com/articles/SB10001424052702304319804576389601079728920 14

Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231 (1994) 30

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Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327 (2002) 30

Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 Duke L.J. 1607 (2015) 29

Gillian Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 89 (2017) 33

Ilan Wurman, *Constitutional Administration*, 69 Stan. L. Rev. 359 (2017) 14

J. Locke, Second Treatise of Civil Government § 22 31

Jason Iuliano and Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 Notre Dame L. Rev. 619 (2018) 10

John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193 (1991) 14

John S. Baker, *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation (2008), http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes 15, 17

Keith E. Whittington and Jason Iuliano *The Myth of the Nondelegation Doctrine*, 165 U. Pa. L. Rev. 379 (2017) 6, 7

TABLE OF AUTHORITIES – Continued

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Luke W. Goodrich and Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 Seton Hall L. Rev. 353 (2018) 7

O.R. Pilat, *Brooklyn Hens to Cackle in Duel With Scream of the Blue Eagle*, Brooklyn Daily Eagle (May 1, 1935) 23

Patrick McLaughlin and Oliver Sherhouse, *Regulatory Accumulation since 1970*, George Mason University Mercatus Center, https://quantgov.org/charts/regulatory-accumulation-since-1970/ 13

Philip Hamburger, *Is Administrative Law Unlawful?* (2014) 31, 32

Pierce Butler, *Letter to Weedon Butler*, The Records of the Federal Convention of 1787, Vol. 3, Ed. Max Farrand, New Haven: Yale University Press, 1911 36

Protecting and Promoting the Open Internet, 80 F.R. 19738 (Apr. 13, 2015) 9

Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 Fed. Comm. L.J. 427 (2001) 9

Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 Annals Am. Acad. Pol. & Soc. Sci. 39 (1996) 15

TABLE OF AUTHORITIES – Continued

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Stephen G. Valdes, *Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 U. Pa. L. Rev. 1709 (2005) 7

Task Force on the Federalization of Criminal Law, American Bar Association, The Federalization of Criminal Law (1998) 16

The Federalist No. 47 (James Madison) 36

The Federalist No. 51 (James Madison) 5, 36

The Federalist No. 73 (Alexander Hamilton) 34

The Federalist No. 75 (Alexander Hamilton) 31

Thomas Paine, *Dissertation on First Principles of Government*, The Complete Writings of Thomas Paine (Philip S. Foner ed., The Citadel Press 1945) (1795) 18

Webster's Dictionary (2nd ed. 1938) 8

@CrimeADay, Twitter, https://twitter.com/CrimeADay/ 17, 18, 19, 20

INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice is the national law firm for liberty, litigating in state and federal courts nationwide in defense of private property rights, educational choice, economic liberty, and free speech. The Institute advocates for adherence to the Constitution's constraints on the size and scope of government powers, which are crucial to the preservation of individual liberty. Many of the Institute's past or current clients are subject to federal regulations promulgated under congressional delegations. Some of these clients face or have faced criminal penalties for alleged violations of federal regulations. For these reasons, the Institute for Justice has an interest in the enforcement of the Constitution's separation of powers.

SUMMARY OF THE ARGUMENT

In every high school civics class in America, students learn that in our government's system of checks-and-balances, "the legislature makes [the law], the executive executes [the law], and the judiciary construes the law." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825). It's a simple description, but it matches the basic tripartite structure in our Constitution and would be familiar to the founding generation.

[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this *amicus* brief. No portion of this brief was authored by counsel for any party, and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

Unfortunately, it bears no resemblance to the modern Federal Government. Today, the Executive Branch routinely makes the law, enforces the law, and interprets the law—and even adjudicates many of its own cases.

This case is not about if, when, or how convicted sex offenders should register with law enforcement—all very serious questions which *Congress* has good reason to address. This case is about something more fundamental: "[p]ower" and the "equilibrium the Constitution sought to establish" with our tripartite system of government. *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). And this case presents the Court with an opportunity to restore the legislative power to the correct branch.

In Section I, *amicus* argues that the nondelegation doctrine derived from the Vesting Clauses is treated as dead letter by federal courts, and the result is the concentration of lawmaking and law enforcement in the Executive Branch. From 1940 to 2015, the period of the modern intelligible principle test, a study reveals **0.06 percent** of nondelegation challenges prevailed in federal courts. Compare that to the **12 percent** of federal nondelegation challenges that prevailed *before* the Court adopted the modern intelligible principle test. Or compare it to the **16 percent** of state nondelegation challenges that prevailed in the same period, 1940-2015. The 12 and 16 percent success rates are comparable to the success rates of constitutional claims under the Free Speech Clause, Free Exercise Clause, and Fourth Amendment exclusionary rule.

Now, the Executive Branch makes much more law than the Legislative Branch, thanks to broad and unchecked congressional delegations that outsource lawmaking to the President and independent federal agencies. In 2016, federal agencies promulgated almost **100,000 pages** of federal rules in the Federal Register, **about 17 times** as many pages as the roughly **6,000 pages** of statutory law enacted during the 114th Congress. Today, the Code of Federal Regulations (C.F.R.) includes **one million** regulatory mandates or prohibitions, and imposes over **one trillion** dollars in costs.

It is particularly troubling that Congress often outsources to the Executive Branch the job of deciding what conduct to criminalize (including delegations directly to the Nation's prosecutors, as in this case). There are **300,000** or more regulatory crimes scattered throughout the C.F.R., **67 times** as many crimes as the about **4,500** federal statutory crimes. Some of these regulatory crimes are seriously absurd, like the criminalization of misshaped meatloaf or mislabeled marbles. Others address serious subjects, like the Sex Offender Registration and Notification Act ("SORNA") regulation at issue here. But the serious problem is that the Executive Branch, not the Legislative Branch, is deciding what conduct to punish.

In Section II, *amicus* argues that even if the delegation at issue here is the rare example of a delegation impermissible even under the intelligible principle test, as Petitioner persuasively argues, it is nonetheless time for the Court to sever ties with that test. The

modern intelligible principle test is utterly divorced from the Constitution's text, structure, and history. This Court should adopt a more originalist nondelegation test that would return lawmaking to where it belongs.

Because the Second Circuit's decision in *United States v. Guzman*, 591 F.3d 83 (2d Cir. 2010), on which the lower Court's decision relied, *see* Petitioner's Brief at 14, rests on a flawed application of the Vesting Clauses, this Court should reverse.

ARGUMENT

The "nondelegation doctrine"—the principle that Congress may not outsource its exclusively legislative powers to any other Branch or to private parties—comes from the Constitution's opening declaration that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. *See also Mistretta v. United States*, 488 U.S. 361, 371 (1989) (the nondelegation doctrine derives from Article I's vesting of legislative power in Congress). Congress's Vesting Clause does not say "some," or "much," or "most" legislative powers are vested in Congress. It says "all" legislative powers are vested in Congress—and Congress alone.

Yet we "have come to a strange place in our separation-of-powers jurisprudence." *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1240 (2015) (Thomas, J., concurring). Today, federal agencies, not

Congress, create most new federal law. The Executive Branch routinely regulates—and even more troubling, *criminalizes*—garden-variety private conduct. This new order threatens the individual liberties our Constitution is designed to protect. To help restore the separation of powers, the Court should adopt an originalist nondelegation test.

I. Federal Courts Have Abandoned the Nondelegation Doctrine, and Significant Lawmaking Power is Now Concentrated in the Executive Branch

The principle that "Congress cannot delegate the legislative power" is "vital to the integrity and maintenance of the system of government ordained by the Constitution." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892). But the modern intelligible principle test has erased that vital principle from this Court's jurisprudence.

Since 1935, no public nondelegation challenge has prevailed at the Supreme Court under the modern "intelligible principle test." This highly-permissive test gives Congress a green light to freely delegate away its exclusive power to regulate private conduct. The result is the "gradual concentration" of Congress's exclusive lawmaking power into the Executive Branch. James Madison, Federalist No. 51. The President now makes more law than Congress—by an order of several magnitudes—and regulatory agencies have promulgated hundreds of thousands of federal criminal offenses.

Even if any particular regulation could be defended as a permissible delegation, in the aggregate, the sheer scope of modern regulatory law would be incomprehensible to the founding generation. It is particularly troubling that the making of criminal law is now concentrated in the Executive Branch. *See United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) ("the power of punishment is vested in the legislative" branch, "which is to define a crime, and ordain its punishment"). These regulations pose a serious threat to individual liberty.

A. The Modern Intelligible Principle Test Allows the Executive Branch to Make Law and Decide Policy

In 1825, this Court recognized that the Vesting Clauses prohibit Congress from delegating away enumerated "powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825). This "nondelegation principle" is rooted in Article I, § 1 of the U.S. Constitution, which vests Congress with "[a]ll legislative Powers herein granted." *Amicus* discusses the original understanding of this provision in greater detail *infra* at Section II.

For more than a century after the Court decided *Wayman*, various federal courts held a number of delegations violated the Constitution's separation of powers. Between 1880 and 1940—during the initial expansion of the administrative state—12 percent of federal nondelegation challenges prevailed. Keith E.

Whittington and Jason Iuliano *The Myth of the Nondelegation Doctrine*, 165 U. Pa. L. Rev. 379, 426 (2017). That figure suggests that federal courts took the nondelegation doctrine seriously[2]—but also that, consistent with Chief Justice John Marshall's caution in *Wayman*, federal courts do not appear to have "enter[ed] unnecessarily" into nondelegation disputes. *Wayman* at 46. The success rate of nondelegation claims in this period resembles the success rate of other constitutional claims, such as religious liberty claims under the Free Speech Clause (14 percent success rate) or under the Free Exercise Clause (20 percent success rate). *See* Luke W. Goodrich and Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 Seton Hall L. Rev. 353, 382 (2018). And it resembles the success rate of Fourth Amendment exclusionary rule claims (11.62 percent of suppression motions result in acquittals). *See* Stephen G. Valdes, *Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 U. Pa. L. Rev. 1709, 1728 (2005).

The most prominent example of a successful nondelegation challenge is probably *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935),

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[2] The study's authors draw a different conclusion from the raw numbers: that a 12 percent success rate shows the nondelegation doctrine was "already dead" before 1940, *id.* at 431. A 12 percent success rate does not support this conclusion, given the comparable success rates in other constitutional claims discussed above. But the 0.06 percent success rate under the modern intelligible principle test is definitely "dead."

discussed in greater detail *infra* at Section I(D)(3). But then, in a series of cases in the 1940s, the Court adopted a new nondelegation test, even though it ostensibly invoked the "intelligible principle" test from an earlier case, *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928). Under the new version of the test, Congress may delegate its lawmaking powers to an agency so long as Congress suggests an "intelligible principle" to guide the agency's lawmaking—with the added wrinkle that a statute is sufficiently "intelligible" if Congress sets the "general policy" direction for the agency to pursue. *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) (finding no impermissible delegation where Congress authorized the SEC to prohibit reorganizations that "unfairly or inequitably" distribute voting power).

Applying the modern intelligible principle test, this Court has held, for example, that Congress can delegate to an agency the power to fix prices at a level that the agency finds "fair and equitable," *Yakus v. United States*, 321 U.S. 414, 427 (1944); to decide what utility charges are "just and reasonable," *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 600 (1944); or regulate public broadcasting in a manner that is "in the public interest." *National Broadcasting Co. v. United States*, 319 U.S. 190, 224-225 (1943).

"Fair," "just," and "public interest" are all "intelligible" terms—in the sense that those words, to some degree, are "capable of being understood." Webster's Dictionary (Second Edition) (1938). But they're also capable of being misunderstood, or even manipulated.

And they grant broad policymaking authority that is "too great . . . to be called anything other than legislative." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (cleaned up) (arguing that a principle can be both "intelligible" and yet still legislative).

The *National Broadcasting Co.* case shows just how legislative in character "public interest" rulemakings can be. As of at least 2001, Congress had authorized the FCC to act in the "public interest" in close to a hundred statutory provisions—so many times that the FCC now couches much if not most of its regulations and enforcement in the public interest rubric. *See* Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 Fed. Comm. L.J. 427, 429 (2001). The FCC has invoked the standard to encourage some political programming, to discourage programming involving drugs or sex, to transform the ownership structure of TV, cable, newspaper, and wireless companies, and to interfere with mergers—to name a few. *Id.* at 429-430. And in 2015, the FCC invoked the "public interest" to justify much of its controversial Open Internet Order, which reclassified the Internet under Title II of the Act as a communications service subject to significantly greater government oversight. *See* Protecting and Promoting the Open Internet, 80 F.R. 19738 (Apr. 13, 2015) (referencing the "public interest" over 100 times in final rule).

B. Although Federal Courts now Treat the Nondelegation Doctrine as a Dead Letter, Data Show Federal Courts Routinely Enforced Nondelegation For a Century, and State Courts Still Do

The modern intelligible principle test did not weaken the nondelegation doctrine—it erased it. Between 1940 and 2015 the effective success rate for all federal nondelegation challenges in the federal appellate courts and U.S. Supreme Court had fallen to a remarkable **0.06 percent**. Jason Iuliano and Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 Notre Dame L. Rev. 619, 636 (2018) (only five of 156 nondelegation challenges prevailed in federal appellate courts; of those five decisions, four were reversed). And this Court has not held that a statute impermissibly delegated legislative power to the Executive Branch since 1935, when the Court decided *Schechter Poultry*, discussed *infra* at Section I(D)(3).

The experience of state courts applying their own nondelegation doctrines during the same period provides a stark contrast. From 1940 through 2015, nondelegation challenges prevailed in 151 out of 919 state court cases—an invalidation rate of 16 percent. Iuliano and Whittington at 636. That percentage is roughly comparable to the average success rate of 20 percent for all constitutional challenges in state courts. *Id.* at 637.

Florida is illustrative. Like the federal Constitution, the Florida Constitution establishes a similar

tripartite system, with each branch's powers limited to those enumerated "herein." Fla. Const., art. II, § 3 ("No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein"). But unlike the federal Constitution, state courts continue to enforce the Florida Constitution's separation of powers. *See* A. J. Kritkos, *Resuscitating the Non-Delegation Doctrine: A Compromise and an Experiment*, 82 Mo. L. Rev. 441 (2017) (describing the Florida experience enforcing the nondelegation doctrine).

For example, in *Askew v. Cross Key Waterways*, 372 So.2d 913 (Fla. 1978), the court held that an environmental statute authorizing a state agency to designate "areas of critical state concern" was impermissible because it ceded to an agency the core legislative power to determine what "concerns" are "critical" to the state. *Id.* at 925. The Florida Supreme Court expressly rejected the federal intelligible principle test, which the court described as "abandon[ing] the doctrine of nondelegation." *Id.* at 924. The court also rejected the argument that the "complexities of modern society" require the legislature to repose in an agency "the power to establish fundamental policy." *Id.* Instead, the court ruled that if legislation is "so lacking in guidelines" that it empowers the agency to become "the lawgiver rather than the administrator," it is unconstitutional. *Id.* at 918-919.

The experience of Florida and other states suggests that greater enforcement of constitutional nondelegation is judicially administrable. Whatever the

"correct" success rate for federal nondelegation challenges might be, it should be greater than zero. That the success rate under the current test is effectively zero suggests that the current test is incompatible with what the Constitution demands.

C. Lawmaking by Regulatory Bodies Now Outpaces Lawmaking by Congress, and Over One Million 'Regulatory Restrictions' Impose Over a Trillion Dollars in Annual Costs

Relying on broad delegations of authority, the President now routinely sets policy and makes law on important subjects and routinely regulates private conduct. Indeed, the President now makes more law than Congress. During the 114th Congress (2015-2016), Congress enacted 6,170 pages of law. *See* Brookings Institution's Vital Statistics, *Congressional Workload, 30th-114th Congresses, 1947-2016*, Table 6-4, https://www.brookings.edu/wp-content/uploads/2017/01/vitalstats_ch6_full.pdf. In stark contrast, in 2016, federal agencies promulgated 97,069 pages of federal rules in the condensed, tri-column format of the Federal Register. *Id.* at Table 6-5.

That gulf between the amount of lawmaking done by Congress and the amount of lawmaking done by federal agencies has not always been so immense. The 81st Congress (1949-1950) enacted 2,314 pages of public laws, *see* Brookings Institution's Vital Statistics at Table 6-4, and the same year, federal agencies

promulgated 9,562 pages of regulations, *see* Federal Register Pages Published 1936-2017, FederalRegister.gov, https://www.federalregister.gov/uploads/2018/03/pagesPublished2017.pdf.

The total size of the C.F.R. has grown at an immense rate. Between 1950 and 2016, the total pages of federal regulatory law grew by 1,890 percent. *See* Code of Federal Regulations Total Pages and Volumes 1938-2017, FederalRegister.gov, https://www.federalregister.gov/uploads/2018/03/cfrTotalPages2017.pdf (showing 9,745 pages in the C.F.R. in 1950 and 185,053 pages in the C.F.R. in 2016).

Nor are these pages of regulations merely hortatory. One quantitative study shows that the number of "regulatory restrictions"—the researchers' term to describe phrases like "*shall*" or "*must*" or other words that require or prohibit activity—in the C.F.R. has steadily increased by about 13,000 restrictions per year. By the end of 2016, the C.F.R. included at least 1,080,000 total regulatory restrictions. *See* Patrick McLaughlin and Oliver Sherhouse, *Regulatory Accumulation since 1970*, George Mason University Mercatus Center, https://quantgov.org/charts/regulatory-accumulation-since-1970/. These "regulatory restrictions" impose an estimated $1.96 trillion (that's with a *t*) in costs on the U.S. economy each year. *See* Clyde Wayne Crews Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State, 2017 Edition*, Competitive Enterprise Institute, 2-3 (2017), https://cei.org/sites/default/files/Ten%20Thousand%20Commandments%202017.pdf.

And often, federal agencies regulate on important, controversial topics precisely because Congress has *not* adopted the policies the agencies prefer, such as the EPA's Clean Power Plan or the FCC's Open Internet Order. *See* Ilan Wurman, *Constitutional Administration*, 69 Stan. L. Rev. 359, 371 fn. 53 (2017) (describing some of the "recent controversial" rulemakings as "involve[ing] important political issues" Congress debated but had not acted on).

D. Congressional Delegations Have Resulted in Over 300,000 Regulatory Crimes, Criminalizing Everything from Mislabeled Marbles to Misshaped Meatloaf

Regulatory criminalization provides a good example of how widespread legislative delegation endangers individual liberty. There are so many federal crimes today that "scholars actually debate their numbers." *United States v. Baldwin*, 745 F.3d 1027, 1031 (10th Cir. 2014) (citing John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991)). After the Department of Justice assigned Ronald Gainer to count all federal criminal laws in 1982, he had to give up because "[y]ou will have died and resurrected three times" before counting them all. Gary Fields and John R. Emshwiller, *Many Efforts to Count Nation's Federal Criminal Laws*, Wall Street Journal, Jul. 23, 2011, https://www.wsj.com/articles/SB10001424052702304319804576389601 07

9728920. The best estimates suggest that with at least 300,000 regulatory crimes in the C.F.R, there are 67 times as many federal regulatory crimes as the 4,450 statutory crimes in the U.S. Code. *Baldwin*, 745 F.3d at 1031 (citing estimate of 300,000 regulatory crimes) and John S. Baker, *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation (2008), http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes (estimating 4,450 federal statutory crimes).

1. The abundance of federal criminal law is a recent phenomenon.

"Before the Civil War, Congress enacted very few criminal laws and crime control was left largely to the states." *United States v. Matchett*, 837 F.3d 1118, 1119 (11th Cir. 2016) (cleaned up). The few federal crimes addressed "injury to or interference with the federal government itself or its programs" or crimes against individuals that occurred on federal lands or waters. Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 Annals Am. Acad. Pol. & Soc. Sci. 39, 40 (1996).

For example, the first federal criminal code—adopted by the Congress in 1790—only covered seven categories of offenses against the United States itself or offenses on federal lands, waters, or the high sea: treason (including misprision of treason), piracy, murder and mayhem, larceny, offenses against the judicial tribunal (such as perjury, bribery of judges,

obstruction, theft of executed bodies, and prison breaks), offenses against diplomats, and counterfeiting. *See* Crimes Act of 1790, ch. 9, 1 Stat. 112.

Since the New Deal—and in particular, since the 1970s—the number of federal criminal statutory laws has increased significantly. But whatever broader concerns may exist about the federalization of criminal law, *see, e.g.*, *Task Force on the Federalization of Criminal Law*, American Bar Association, The Federalization of Criminal Law (1998), federal *statutory* crimes are, at least, enacted by the body the Constitution entrusted with the legislative power. *Wiltberger*, 18 U.S. (5 Wheat.) at 95 (describing criminalization as the province of the Legislative Branch). *See also United States v. Evans*, 333 U.S. 483, 486 (1948). But statutory crimes adopted by Congress constitute only a tiny fraction of all federal criminal offenses today.

2. Examples from the 300,000 regulatory crimes show agencies criminalize harmless, garden-variety private conduct

Today, Congress "freely delegate[s] the core legislative business of writing criminal offenses to unelected" bureaucrats. *Baldwin*, 745 F.3d at 1030. As a result, the Code of Federal Regulations (C.F.R.) is now "crowded" with regulatory crimes because of "generous congressional delegations" of authority. *Id.* at 1031. One estimate from 1990 pegged the number of regulatory crimes at 300,000. *Id.* Thirty years later, the

number is likely much greater. Compare the 300,000 regulatory crimes with the roughly 4,450 statutory crimes in the U.S. code. John S. Baker, *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation (2008), http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes.

It's not always obvious what regulatory violations carry criminal penalties. Indeed, "[n]ormally we don't think of regulatory agencies as entitled to announce new crimes by fiat," so understanding whether regulatory noncompliance triggers criminal penalties requires "some scratching around." *Baldwin*, 745 F.3d at 1030. Often, it's necessary to read through several statutory provisions and several regulations.

The popular @CrimeADay Twitter account, which has reported one federal crime a day for nearly four years, provides a revealing glimpse into the broad and bewildering world of regulatory crimes. *See* @CrimeADay, Twitter (Jul. 17, 2015), https://twitter.com/CrimeADay/status/622073623013146624 (estimating it will take 800 years to tweet one federal crime per day).

Take 40 U.S.C. § 1315, which authorizes "unelected property managers" to write regulations to protect and administer federal property. *Baldwin*, 745 F.3d at 1030-1031 (expressing reservations about regulatory criminalization while upholding conviction for refusal to give officer license and registration). The objective of the statute's delegation, protecting federal

property, is reasonable enough. But what measures are reasonable for the protection of federal property is tougher to answer. The danger with such a broad delegation is, as the Framers well understood, that the "avidity to punish . . . leads men to stretch, to misinterpret, and to misapply even the best of laws." Thomas Paine, *Dissertation on First Principles of Government*, The Complete Writings of Thomas Paine 588 (Philip S. Foner ed., The Citadel Press 1945) (1795).

How reasonable are these protections of federal property? Federal regulations issued under 40 U.S.C. § 1315 make it a crime to fall asleep at the U.S. Meat Animal Research Center in Clayton, Nebraska, *see* 40 U.S.C. § 1315(c), 7 C.F.R. § 501.5, and 7 C.F.R. § 500.15[3] or to collect on a private debt while in the National Arboretum *see* 40 U.S.C. § 1315(c), 7 C.F.R. § 500.8(a)(3), and 7 C.F.R. § 500.15.[4] And when at the National Institutes of Health, don't ride a bicycle without a horn, *see* 40 U.S.C. § 1315, 45 C.F.R. § 3.27, and 45 C.F.R § 3.3.[5] And don't engage in any hobbies outside designated areas, *see* 40 U.S.C. § 1315(c), 45 C.F.R. § 3.42(a), and 45 C.F.R § 3.3,[6] or go rollerskating, 40 U.S.C. § 1315(c)(2),

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[3] @CrimeADay, Twitter (Jun. 10, 2015), https://twitter.com/CrimeADay/status/608826503678316544.

[4] @CrimeADay, Twitter (Aug. 8, 2017), https://twitter.com/CrimeADay/status/895097729025589248.

[5] @CrimeADay, Twitter (Nov. 14, 2015), https://twitter.com/CrimeADay/status/665719787599872000.

[6] @CrimeADay, Twitter (Jun. 15, 2015), https://twitter.com/CrimeADay/status/610626593996828672.

45 C.F.R. § 3.42(e), and 45 C.F.R § 3.3.[7] Those are crimes, too.

One need not visit federal property to risk an amusement-related criminal offense. According to the Consumer Product Safety Commission ("CPSC"), it's a criminal offense to sell classic toys like lawn darts, *see* 15 U.S.C. §§ 1261, 1262, 1263, 1264 and 16 C.F.R. § 1500.18(a)(4),[8] and toy clackers *see* 15 U.S.C. §§ 1261, 1262, 1263, 1264 and 16 C.F.R. § 1500.18(a)(7).[9] And CPSC says it's a crime to sell a toy marble without an explicit warning that the toy marble is a toy marble, *see* 15 U.S.C. §§ 1261, 1262, 1263, 1264 and 16 C.F.R. § 1500.19(b)(4)(i).[10] And that warning better include an exclamation mark inside an "equilateral" triangle—no isosceles or right triangles allowed—or that's a crime, too, 15 U.S.C. § 1264 and 16 C.F.R. § 1500.19(d)(11).[11]

Federal regulators care a lot about shapes when it comes to the dizzying array of food crimes, too. Under regulations by the Food and Drug Administration ("FDA"), the unwary pasta seller might face federal criminal sanctions for selling "egg noodles" if they're

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[7] @CrimeADay, Twitter (Jul. 23, 2015), https://twitter.com/CrimeADay/status/624385604395134977.

[8] @CrimeADay, Twitter (Aug. 8, 2014), https://twitter.com/CrimeADay/status/497761129016623104.

[9] @CrimeADay, Twitter (Jun. 15, 2016), https://twitter.com/CrimeADay/status/743246979203989504.

[10] @CrimeADay, Twitter (Feb. 23, 2016), https://twitter.com/CrimeADay/status/702289127325229056.

[11] @CrimeADay, Twitter (Aug. 14, 2016), https://twitter.com/CrimeADay/status/764986590422769665.

not ribbon-shaped, *see* 21 U.S.C. §§ 331, 333, 341, 343(g) and 21 C.F.R. § 139.150(b).[12] Ditto selling soy spaghetti if it's not tube- or cord-shaped, *see* 21 U.S.C. §§ 333, 341 and 21 C.F.R. §§ 139.140 & 139.110(c).[13] The FDA is also concerned about the shape of meatloaf—if it's labeled "Old Fashioned," it better be rectangular with a rounded top, or circular with a flat bottom, or that could be a federal crime, too. *See* 21 U.S.C. § 676 and 9 C.F.R. § 301.2, 9 C.F.R. § 317.8(b)(9)(iii). And woe unto the baker who sells his raisin buns with an inadequate raisin-to-flour ratio, *see* 21 U.S.C. §§ 331, 333, 341, 343(g) & 21 C.F.R. § 136.160(a)(1),[14] or the fromager who unevenly distributes spices throughout her spiced cheeses, *see* 21 U.S.C. §§ 333, 343 and 21 C.F.R. § 133.190(a)(3).[15]

One might be inclined to call these regulatory food crimes "pure applesauce," *King v. Burwell*, 135 S. Ct. 2480, 2501 (2015) (Scalia, J., dissenting)—but be careful: canned applesauce with the apple core left in is a federal crime, too. *See* 21 U.S.C. §§ 331, 333, 343 and 21 C.F.R. § 145.110(a)(1).[16]

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[12] @CrimeADay, Twitter (Feb. 10, 2018), https://twitter.com/CrimeADay/status/962517407456784384.

[13] @CrimeADay, Twitter (Oct. 14, 2017), https://twitter.com/CrimeADay/status/919369010030006272.

[14] @CrimeADay, Twitter (Nov. 17, 2017), https://twitter.com/CrimeADay/status/931695361651036160.

[15] @CrimeADay, Twitter (Jul. 28, 2017), https://twitter.com/CrimeADay/status/891086266292416512.

[16] @CrimeADay, Twitter (Jul. 2, 2017), https://twitter.com/CrimeADay/status/881693280207077376.

One would hope that no prosecutor would have the poor judgment to bring charges under any of these regulations. But then, poorly-conceived criminal laws "give prosecutors too much leverage," *see Yates v. United States*, 135 S. Ct. 1074, 1100-1101 (2015) (Kagan, J., dissenting), and that leverage is tempting. One would not be surprised to see a prosecutor zealously pursue a conviction under an ill-fitting criminal statute. *See, e.g. Yates* at 1079-1080 (Ginsburg, J., announcing judgment of the Court) (describing the federal prosecution of a fisherman who faced 60 years in prison for tossing three under-sized fish back into the ocean).

3. The targeted prosecution of the Shechter Brothers shows the threat that regulatory criminalization poses to liberty

Schechter Poultry, the case most closely associated with the nondelegation doctrine, also involved a federal food regulation with criminal penalties. Unfairly nicknamed the "Sick Chickens Case," the *Schechter Poultry* opinion has been invoked by critics of judicial enforcement of the nondelegation doctrine as a cautionary tale. *Schechter Poultry* merits rehabilitating: the broader history and context of the case show the danger of delegating lawmaking to law enforcement, and the importance of meaningful judicial enforcement of the separation of powers.

Schechter Poultry involved a challenge to § 3 of the National Industrial Recovery Act ("NIRA"), which

authorized the President to create "codes of fair competition" for trades or industries, selected by the President, so long as the President determines the regulations are "in furtherance of the public interest." *Schechter Poultry*, 295 U.S. at 840.

The Act marked a rapid rise in federal regulatory lawmaking. In a single year, the federal government produced around 10,000 pages of new law, mostly regulatory, compared to the 2,735 pages of federal law created during the preceding 145 years, *combined*. *See* Amity Shlaes, The Forgotten Man 201-202 (2007) ("In twelve months, the NRA had generated more paper than the entire legislative output of the federal government since 1789").

The "Live Poultry Code," promulgated under NIRA, was among that wave of new regulations. The Live Poultry Code covered individuals involved in selling, purchasing for resale, transporting, handling, or slaughtering poultry. *Schechter Poultry*, 295 U.S. at 840. The Code regulated an array of business practices, including the maximum number of hours worked per day, the minimum pay for employees, poultry inspection requirements, record-keeping requirements, price controls, and prohibiting "unfair methods of competition," such as a ban on "straight killing," a curious term that means letting customers choose which chickens they want to purchase. *Id.* at 841-842. The Code required a customer blindly to put his hand into a chicken coop "and take the first chicken that comes to hand," "irrespective of the quality of the chicken." Shlaes at 241 (quoting from the *Schechter Poultry* oral argument).

Donald Richberg, the co-author of the Act and the director of the new National Recovery Administration, warned the Justice Department that the Act could face constitutional challenges, and so the Roosevelt Administration actively sought a "test case" to try to prove the Act's constitutionality. Shlaes at 203. Federal prosecutors eventually settled on the poultry industry to bring a test case, hoping that negative public sentiments about live chicken butchering would highlight the health benefits of the New Deal. *Id.*

At the time, minority groups dominated the purchase of live-butchered chickens in New York City: 80 percent of these chickens were sold to Jewish families, the rest to African Americans, Chinese, and Italian residents. *See* O.R. Pilat, ***Brooklyn Hens to Cackle in Duel With Scream of the Blue Eagle***, Brooklyn Daily Eagle, May 1, 1935 at 3.

The Schechter family immigrated to the U.S. from Eastern Europe. The Schechter brothers—Aaron, Alexander, Joseph, and Martin—opened a kosher slaughterhouse in Brooklyn. Shlaes at 215. They purchased live chickens, butchered them according to Jewish kosher law, and sold the kosher chickens to retailers. *Id.* at 215-216. Each day, the Schechters butchered about 600 chickens, officiated by Rabbi Hellal Girschon. *See* Pilat, ***Brooklyn Hens to Cackle in Duel With Scream of the Blue Eagle***, Brooklyn Daily Eagle, May 1, 1935 at 3.

In July 1935, the Schechter brothers were indicted on 60 counts of violating the Live Poultry Code, Shlaes

at 204. Of those, the court convicted the Schechters on 18 counts, two of which were reversed on appeal to the Second Circuit, leaving 16 counts for consideration by the Supreme Court. *Schechter Poultry*, 295 U.S. at 519-520. The convictions include (1) one count of conspiracy to violate the Live Poultry Code, (2) ten counts of "straight killing," (3) two counts of failing to follow New York City chicken-inspection regulations, (4) two counts of failing to report correctly the "range of daily prices and volume of sales," (5) one count of selling to an unlicensed chicken dealer, and (6) one count of selling an "unfit" chicken. *Id.* at 525-528.

The number of indictments and convictions may sound impressive but recall that the Schechters butchered around 600 chickens per day or 3,600 chickens per week. NRA officials investigated the Schechters for some period during the summer of 1934. The Schechters described the investigation as intrusive and extensive, not to mention extremely disruptive to the brothers' business. *See* Shlaes at 214-243 (recounting history of the investigation, prosecution, trial, and appeals). If the NRA Code Authority only investigated the Shechters for a week, then out of the 3,600 butchered chickens, federal investigators identified a mere ten times (or 0.028 percent of chickens in a week) in which the Schechters had unlawfully allowed their customers to choose for themselves which chicken to purchase.

As for the ominous-sounding criminal conviction for the sale of an "unfit" chicken, out of perhaps 3,600 butchered chickens in a week, the Code investigators

identified only ten (or 0.028 percent) they thought *might* be "unfit," or unhealthy. *Id.* at 223-224. Further investigation narrowed the number to three suspect chickens (0.0083 percent), and autopsies revealed only *one* "unfit" chicken, or 0.0028 percent of the chickens butchered in a week. *Id.* And that chicken was found "unfit" only because it was an "eggbound chicken," or a chicken with eggs lodged inside—a fact that would have been hard for the Schechters to have known. *Id.*

Calling *Shechter Poultry* the "Sick Chickens Case" is misleading: despite an extensive investigation, the agency never found a single instance where the Shechters sold a sick chicken. But this myth about the case fit with the narrative the Richberg and the DOJ hoped to cultivate in their "test case": that its regulations were necessary to protect public health. Shlaes at 203.

The Live Poultry Code regulations and the prosecution of the Schechters highlight the danger of Congress delegating away its lawmaking powers—and why the Court should enforce the nondelegation doctrine. The Live Poultry Code's extensive regulations criminalized a wide-range of private, garden-variety conduct. Not only did the Schechters face imprisonment and other quasi-criminal penalties, the regulations exposed the Schechters to an invasive, wide-ranging prosecution that nearly destroyed their family business. *Id.* at 221-223. Whatever else might be considered an "important" lawmaking subject, *see Wayman*, 23 U.S. (10 Wheat.) at 43, the choice whether to bring the federal government's weighty criminal

prosecution power to bear on private conduct is certainly "important."

The Live Poultry Code and the criminal offenses highlighted by @CrimeADay might strike different people as serious or seriously absurd. But that is beside the point. The C.F.R. is "crowded" with absurd criminal offenses, as well as criminal offenses that could be justified on sound legal and policy grounds—including the Department of Justice regulation at issue here, 28 C.F.R. § 72.3. But these regulations reflect policymaking and lawmaking by the Executive Branch, not Congress, even though "defining crimes and fixing penalties" is an exclusively legislative function. *Evans*, 333 U.S. at 486.

II. The Court Should Adopt an Originalist Nondelegation Test Rooted in the Text, Structure, and History of the Constitution's Vesting Clauses

An originalist nondelegation test would look very different from the modern intelligible principle test. A test that comports with the text, structure, and history of the Vesting Clauses would recognize that,

(1) the Constitution does not expressly authorize Congress to delegate its exclusively legislative powers to the President;

(2) the Constitution does not implicitly authorize Congress to delegate its exclusively legislative powers to the President;

(3) even if Congress can assign some discretion to the President to carry out properly-promulgated legislation, Congress cannot delegate the exclusively legislative task of regulating private conduct or making law on "important subjects," including criminalization and other major policy questions; and

(4) because the separation of powers exists to protect liberty, the tie should go to liberty in close cases.

The Court should replace the intelligible principle test with a test rooted in these principles.[17]

A. The Constitution Does Not Expressly or Implicitly Authorize Congress to Delegate Away the Exclusively Legislative Power to Regulate Private Conduct

"The Federal Government 'is acknowledged by all to be one of enumerated powers.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534 (2012) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819)). The text, history, and structure of the U.S. Constitution confirm what this Court recognized long ago: Congress cannot delegate away enumerated "powers which are strictly and exclusively legislative." *Wayman*, 23 U.S. (10 Wheat.) at 43. The first section of each of

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[17] Petitioner persuasively argues that 34 U.S.C. § 20913(d) is the rare example of a delegation that would fail even the modern intelligible principle test. Indeed, 34 U.S.C. § 20913(d) is remarkably rudderless because it lacks even the vague "general policy" direction required by *Am. Power & Light Co.*

articles I, II, and III vests a separate branch with specific, particular powers: art. I, § 1 vests Congress with "[a]ll legislative Powers"; art. II, § 1 vests the President with the "executive Power"—the power to carry the law into effect; and art. III, § 1 vests the "judicial Power"—the power to interpret the law and render judgments—in the Supreme Court and any inferior courts established by Congress.

1. The Constitution does not expressly authorize Congress to delegate its exclusively legislative powers

Art. I, § 1 includes two internal textual limitations on Congress's legislative powers: first, the legislative power is limited to enumerated powers "herein granted" in Article I. *See Martin v. Hunter's Lessee*, 1 Wheat. 304, 326 (1816) ("The Government . . . can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication"). And second, the Constitution vests "all" legislative powers in Congress, rather than in the other branches. The "nondelegation doctrine" stems from the combined effect of U.S. Const. art. I, § 1's two textual limitations on Congress's power. *See Mistretta* at 371 (explaining the nondelegation doctrine "derives from the Constitution's opening declaration"). The Constitution does not dole out legislative power all over the place—it lists specific powers in one section.

The powers enumerated in art. I, § 8 are varied but specific. For example, Congress has the power to tax and spend, cl. 1; the power to regulate commerce among the states and with foreign nations and Indian tribes, cl. 3; the power to establish post offices and roads, cl. 7; the power to create inferior courts, cl. 9; and the power to raise and support armies, cl. 12.

But the power to delegate legislative authority isn't among the detailed powers in art. I, § 8. The *lack* of this authority is significant, because "[t]he Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government can exercise only the powers granted to it." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534-535 (2012) (cleaned up).

Without express authority to delegate, defenders of broad delegations look to the Necessary and Proper Clause, art. I, § 8, cl. 18, to "approv[e] the modern administrative state." *INS v. Chadha*, 462 U.S. 919, 982-984 (1983). *See, e.g.*, Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 Duke L.J. 1607, 1639 (2015) (arguing the Necessary and Proper Clause gives Congress the "ability to design innovative governmental structures or regulatory measures").

But the Necessary and Proper Clause is not a free-standing grant of power. It vests Congress only with the authority to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers" mentioned in art. I, § 8, and "all other

Powers vested by this Constitution" in any other branch or to any officer. In other words, the Necessary and Proper Clause does not itself grant Congress any *additional* enumerated powers—it only enables Congress to pass laws to carry into execution other enumerated powers—either its own enumerated powers, or the enumerated powers of other branches or officers. *See, e.g.*, *Wayman* 23 U.S. (10 Wheat.) at 22 (describing the Process Act of 1792 as enabling the Judicial Branch to "carry into Execution" the Judiciary's own vested power to render judgment, rather than delegating to the Judiciary Congress's exclusively legislative power). *See also* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1234-1235 (1994).

Whatever authority the Necessary and Proper Clause provides Congress, it is not the authority to delegate away any legislative powers that are exclusive to Congress, *see Wayman* at 43, like regulation of interstate commerce, art. I, § 8, cl. 3—the clause perhaps most often invoked by Congress in its modern, sweeping delegations to the President.

2. The Constitution does not implicitly authorize Congress to delegate its exclusively legislative powers

Nor would the founding generation have understood the Constitution as granting Congress an implicit authority to delegate away legislative power, either. *See generally* Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327 (2002) (arguing

that a power, once delegated, cannot be delegated away). *See also* Philip Hamburger, *Is Administrative Law Unlawful?* 377-402 (2014) (tracing the centuries-old principle that power delegated from the people cannot be subdelegated).

This principle—that a power delegated from the people to a department of government may not then be subdelegated to another department—predates the Constitution. For example, John Locke argued that "[t]he legislative cannot transfer the power of making laws to any other hands. For it being but a delegated power from the people, they, who have it cannot pass it to others." J. Locke, Second Treatise of Civil Government § 22, 71. Because the founding generation is unlikely to have understood the Constitution impliedly authorizes the delegation of exclusively legislative powers, this Court should not read an implied authority into the Constitution.

B. Congress May Not Delegate to the Executive the Authority to Establish Generally Applicable Rules Governing Private Conduct

"[T]he formulation of generally applicable rules of private conduct" is among the most well-established and historically-identifiable core legislative powers. *Ass'n of Am. R.R.*, 135 S. Ct. at 1242 (Thomas, J., concurring). *See also Bond v. United States*, 134 S. Ct. 2077, 2106 (2014) (quoting Alexander Hamilton, in Federalist No. 75, that the legislative power is the

power "to prescribe rules for the regulation of the society"). The principle that the core legislative power is the authority to establish general rules for private conduct also predates the founding. *See Ass'n of Am. R.R.*, 135 S. Ct. at 1242-1244 (Thomas, J., concurring). *See also* Philip Hamburger, *Is Administrative Law Unlawful?* 84 (2014) ("the natural dividing line between legislative and nonlegislative power was between rules that bound subjects and those that did not").

Early legislation provides evidence of the general acceptance of this principle. For example, an 1813 statute authorized the Treasury to establish regulations that "shall be binding on each [federal] assessor in the performance of" his duties. The statute did not purport to delegate to the President the authority to establish regulations to bind the private conduct of the general public. *See* Philip Hamburger, *Is Administrative Law Unlawful?* 86 fn. b (2014). Similarly, Hamilton's own conduct as Treasury Secretary also tracks Federalist 75; although his circular to customs officers purported to interpret their obligations under federal customs statutes, he did not claim those interpretations would bind private parties. Instead, the regulations only bound customs officers, who could be fired for failure to follow his instructions. Philip Hamburger, *Is Administrative Law Unlawful?* 89-90 (2014).

C. Congress May Not Delegate to the Executive the Authority to Make Law on Important, Complex Subjects

Legislative power has also long been understood as the power to decide, at a minimum, "important subjects." *Wayman*, 23 U.S. (10 Wheat.) at 43. Yet the modern intelligible principle test flips this on its head, defending broad delegations as a "reflection of the necessities of modern legislation" to let the Executive decide how to handle important "complex economic and social problems." *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). *See also Mistretta* at 372 ("Congress simply cannot do its job absent an ability to delegate power under broad general directives"). The most comprehensive contemporary defense of the modern administrative state also embraces this theory, and even claims that "the modern national administrative state is the constitutionally mandated consequence of delegation." Gillian Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 89 (2017) (arguing that sweeping delegations "are necessary given the economic, social, scientific, and technological realities of our day").

But the Constitution provides no complexity exception to the carefully-calibrated separation of powers. And it certainly does not support the alchemical theory that unconstitutional delegations of sufficient scope and duration transmute constitutional violations into constitutional obligations.

If anything, the founding generation understood and even expected that strict constitutional constraints on government power would "defeat" "good laws"—and they considered this an acceptable tradeoff for the "advantage of preventing a number of bad ones." Alexander Hamilton, Federalist No. 73. In short, the Constitution's constraints on government power were originally understood as a feature, not a bug.

And the theory that 'complex' problems justify broad policymaking delegations flouts *Wayman*. Chief Justice Marshall wrote that the more "important" the policy subject, the more separation of powers demands that Congress—and only Congress—provide the policy answer. *Wayman*, 23 U.S. (10 Wheat.) at 43 ("important subjects" must be "entirely regulated by the legislature itself").

Similar separation-of-powers concerns have animated this Court's reluctance to read "ambiguous statutory text" as congressional delegations of "enormous" and "transformative" power to the executive. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014). *See also King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-160 (2000). Although the major questions doctrine in cases like *UARG*, *King*, and *Brown & Williamson* is a canon of statutory interpretation, it shares a common constitutional DNA with the nondelegation doctrine: at bottom, both are rooted in the Constitution's vesting of lawmaking power in Congress, not the President.

Critics of nondelegation argue that legislation properly promulgated under one of Congress's enumerated powers will, sometimes, require the President to "fill up the details" to carry out Congress's orders. *Wayman*, 23 U.S. (10 Wheat.) at 43. But whatever it might mean to let the President "fill up the details," it can't mean "let the President make important policy choices where the subject is complex." After all, only Congress can regulate "important subjects." *Id.* More likely, to "fill up the details" means to delegate some fact-finding and supervisory authority to the President. *See, e.g., Marshall Field and Co.*, 143 U.S. at 693 (suspending embargo required after President "ascertained the existence of a particular fact").

And whatever else may be considered an 'important subject' which Congress alone must decide, whether to criminalize conduct is certainly an important subject rather than a mere "detail" that can be left to the Executive to "fill up." *See Evans*, 333 U.S. at 486 (defining crimes and their punishments is a legislative task).

D. Because the Separation of Powers Exists to Protect Liberty, In Close Cases, the Tie Should Go to Liberty

"Liberty demands limits on the ability of any one branch to influence basic political decisions," and the Constitution's separation of powers imposes those limits. *Clinton v. City of New York.*, 524 U.S. 417, 450-451 (1998) (Kennedy, J., concurring) ("one branch of government ought not possess the power to shape [the

people's] destiny without a sufficient check from the other two"). Indeed, the one consistent, recurring principle in this Court's nondelegation jurisprudence is that the "ultimate purpose" of the doctrine "is to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 272 (1991). *See also Ass'n of Am. R.R.* at 1237 (Alito, J., concurring) (the Constitution's separation of powers "exists to protect liberty"); *INS v. Chadha*, 462 U.S. 919, 950 (1983) (describing that the Framers expressed "the need to divide and disperse power in order to protect liberty").

During ratification, supporters of the proposed Constitution often invoked its separation of powers to defend against arguments the new federal government would encroach on individual liberty. For example, Convention delegate Pierce Butler wrote in a letter that "[p]ains and attention were not spared" during the Convention to "preserve to the individual as large a share of natural rights" by balancing "the powers of the three Branches, so that no one shoud [*sic*] too greatly preponderate." Pierce Butler, *Letter to Weedon Butler*, The Records of the Federal Convention of 1787, Vol. 3. Ed. Max Farrand, New Haven: Yale University Press, 1911. In Federalist No. 47, James Madison, quoting Baron de Montesquieu, warned that "[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." For that reason, the "enlightened patrons of liberty" regard "[n]o political truth" as "of greater intrinsic value than the separation of powers. And in Federalist No. 51, Madison argued that "separate and distinct exercise of

the different powers of government" is "admitted on all hands to be essential to the preservation of liberty."

The many statements by the founding generation and this Court that the separation of powers is essential to protect individual liberty suggest that when courts are weighing nondelegation challenges, they should consider what effect a delegation would have on liberty. And in close cases, the tie should go to liberty.

* * *

To decide this case, the Court need not stray from its description in *Wayman* of the Federal Government's structure created by the Vesting Clauses—a description which has not been improved upon in the subsequent 193 years: "the legislature makes, the executive executes, and the judiciary construes the law." *Wayman*, 23 U.S. (10 Wheat.) at 46. The President may not make law—and prosecutors may not create crimes.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

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No. 17-6086

In the Supreme Court of the United States

HERMAN AVERY GUNDY,

Petitioner,

v.

UNITED STATES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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1 W. Blackstone, *Commentaries on the Laws of England* 142 (1765) 6
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Philip Hamburger, Is Administrative Law Unlawful? 342 (2014) 9
Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 Harv. L. Rev. 469 (1996) 8

TABLE OF AUTHORITIES—continued

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Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 6 Buff. Crim. L. Rev. 165 (2004)..... 7

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Glenn Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 Colum. L. Rev. Sidebar 102 (2013)..... 7

2 Joseph Story, Commentaries on the Constitution § 542 (1st ed. 1833) 2

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL), founded in 1958, is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for persons accused of crime and other misconduct.[1] NACDL has thousands of members nationwide and when its affiliates' members are included, total membership amounts to approximately 40,000 attorneys. NACDL's members include public defenders, criminal defense attorneys, law professors, U.S. military defense counsel, and even judges.

NACDL strives to preserve fairness and justice within the American criminal justice system. To advance that purpose, NACDL files numerous amicus briefs each year addressing issues of importance to criminal defendants, criminal defense lawyers, and the entire criminal justice system.

This case implicates one of the most fundamental protections of liberty inherent in the separation of powers: the Constitution's structural prohibition on providing the Executive Branch with the power both to define crimes and to prosecute citizens for them. Like the related void-for-vagueness doctrine, the constitutional limits on the Congress's abil-

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[1] All parties have consented to the filing of this brief. See S. Ct. R. 37.3(a). Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission.

ity to delegate its core legislative powers to the other branches protect citizens from prosecution for offenses that their elected representatives have never actually proscribed. The healthy operation of the nondelegation doctrine also reduces the risk of compounded arbitrary action that would arise if the Executive could define the legal standards for private conduct and exercise discretion in enforcing and interpreting those standards.

The present case is extreme, as it is not merely the Executive, but its prosecutorial arm, that the Congress has given the power to decide both whether to impose a criminally enforceable obligation, and what that obligation should be. Upholding such a broadly unlawful delegation could fundamentally change federal criminal law, at great cost to individual liberty. NACDL has a strong interest in preventing that result.

INTRODUCTION AND SUMMARY OF ARGUMENT

Fundamental principles of the separation of powers, implicit in the Constitution's structure, limit what each branch of the federal government can do, and how each branch may accomplish the actions assigned to it. At the same time, the Court has long recognized that the responsibilities of the three branches necessarily overlap to some degree, particularly the responsibility of the legislative branch to enact laws and the responsibility of the executive branch to execute them. But the limited "occasional mixture of some of the powers of each" branch (2 Joseph Story, Commentaries on the Constitution § 542, at 25 (1st ed. 1833) necessary overlaps does not suggest that the separation of powers is illusory, or ex-

ists only as much as may please the particular occupants of one branch or another at a particular time.

As a consequence, the Constitution's directive that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States" (U.S. Const., art. I, § 1) provides a dividing line between those "legislative powers" and the "executive power" that is "vested in a President" (*id.*, art. II, § 1). Neither branch has the authority to shift its express "power" to the other. Indeed, the Constitution guards its assignment of legislative power most jealously, vesting "all" legislative power in the Congress, and only "the" executive and judicial powers in the other branches. *Id.*, art. II, § 1 & art. III, § 1. At minimum, then, the Venn diagram between the two branches accordingly leaves some "legislative power" that Congress alone can exercise and cannot delegate to the Executive.

The issue delegated to the Attorney General in 34 U.S.C. § 20913(d)—whether and under what circumstances the registration obligations of the Sex Offender Registration and Notification Act (SORNA) apply to convictions occurring before the Act took effect—falls squarely in the category of nondelegable legislative power. Section 20913(d) is not so much an exercise of legislative power as an invitation to the Executive to exercise it however it would like.

To begin with, the delegation gives the Attorney General the power to define a federal crime—and one that in almost all circumstances is premised on prior state convictions. The delegation accordingly falls within two trends that call for reinvigorating the constitutional constraints on federal lawmaking. The first is the increasing criminalization of conduct that does not fall within traditional categories of

crime based on nearly universal principles of right and wrong, but instead is a failure to comply with new regulatory obligations that are a step or two away from a harm to person or property. The second is the increasing federalization of criminal law, under which traditional matters of state concern like assault and arson—and failure to register as a sex offender—become federal crimes.

Affirmance here would exacerbate both problems. Should the Attorney General's delegated right to create crimes be upheld, little would stop Congress from adding to the horde of statutes providing that breaching any of a set of regulations is a federal crime. And the underlying—but now criminalized—regulations may be issued under no more guidance than a direction to issue rules "carry out the purposes of this chapter." *E.g.*, 12 U.S.C. § 1244(b).

The aggressively expanding scope of the federal criminal law makes it critical to apply a standard for lawful delegation that contains meaningful limiting criteria. A higher standard is necessary at a minimum in the criminal context, where parallel doctrines may invalidate criminal statutes as void for vagueness, or may require a limited interpretation under the rule of lenity. Delegated legislative power cannot allow a member of the Executive Branch to make unguided but fundamental policy choices about which conduct should be criminally punished. The delegating language cannot merely raise questions for an executive agency to resolve. Rather, it must provide answers for an agency to implement.

If the Court chooses to retain the "intelligible principle" formulation to evaluate delegations of the legislative power, it must restore substantive constraints to the standard for intelligibility. It is not

enough to identify the general subject matter and instruct the agency to make rules about it. Rather, the agency to which power is delegated must receive intelligible guidance on how to resolve any questions delegated to it.

Finally, under any plausible standard, the delegation in Section 20913(d) is unconstitutional. Not only does the Attorney General lack concrete guidance on the rule to be applied to pre-enactment sex offenders, he lacks any guidance at all. He wasn't even directed to make *any* rules about the retroactive application of SORNA. Rather he could do nothing, as one Attorney General did. Congress must either provide the answers to be implemented by the agency, or the analysis to be used within a narrow band of options.

ARGUMENT

A. The Increasing Criminalization of Conduct and Federalization of Criminal Law—Exacerbated by the Widespread Blanket Criminalization of Federal Administrative Regulations—Magnify the Need to Enforce the Constitutional Limits on Delegation.

The delegation issues raised by SORNA's retroactivity provision are especially acute because that provision allows the Executive to define the very crimes it prosecutes. Section 20913(d) is an extreme example because it is not only the Executive, but its prosecutorial arm, that received plenary power to make the fundamental policy choices about what behavior to criminalize. Worse than that, Section 20913(d) allows the Attorney General to decide addi-

tional obligations, enforced by criminal sanctions, based on significance of *past* conduct that has been punished by the States.

For centuries, the consolidation in the Executive of the power to define crime and the power to prosecute it has been recognized as among the worst possible breaches of the separation of powers. See 1 W. Blackstone, Commentaries on the Laws of England 142, 271 (1765). Indeed, "[i]f the separation of powers means anything, it must mean that the prosecutor isn't allowed to define the crimes he gets to enforce." *United States v. Nichols*, 784 F.3d 666, 668 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc)

The trend toward allowing the Justice Department to fill in and (as here) even create the elements of new crimes drew sharp criticism from General Thornburgh when Congress investigated the burgeoning creation of new, poorly defined crimes that occupy an ever-wider range of possible human conduct. "The unfortunate reality is that the Congress has effectively delegated some of its most important authority to regulate crime in this country to Federal prosecutors who are given an immense amount of latitude and discretion to construe Federal crimes and not always with the clearest motives or intentions." Over-Criminalization of Conduct/Over-Federalization of Criminal Law, Hearing before the Subcomm. On Crime, Terrorism, and Homeland Security of the Comm. On the Judiciary, H.R. Serial No. 111-67, 111th Cong., 1st Sess. 6 (July 22, 2009) (testimony of Hon. Richard Thornburgh, former Attorney General). Others have observed the dangerous combination of comprehensive regulation of an ever-expanding area of private life combined with

statutes making violation of a regulation into a crime and with the enormous prosecutorial discretion that results from the minimal-to-nonexistent guidance provided to prosecutors, judges and juries. See generally Glenn Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 Colum. L. Rev. Sidebar 102 (2013); Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 6 Buff. Crim. L. Rev. 165 (2004).

In addition, under current law, statute after statute criminalizes violations of administrative regulations within a defined range of subject matter, regulations that have little obvious connection to the terms any statute passed by both Houses of Congress and presented to the President. In those circumstances, one wing of the Executive Branch defines a crime while the Justice Department brings any criminal prosecution. The dividing line is not sharp, however, given the range of injunctive relief and fines that an administrative agency may impose. More than 25 years ago, these bootstrapped crimes had brought the number of regulations enforceable under the criminal law to more than 300,000. John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L.Rev. 193, 216 (1991)

Adding to the imbalance among the branches, executive agencies' now-criminalized regulations may receive the benefit of deference under *Chevron U.S.A., Inc.* v. *Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984). This Court has declined to apply *Chevron* to criminal statutes. See Pet. Br. 21. Yet agencies routinely command deference for regulations that may have criminal consequences, and

indeed there is substantial academic support for extending *Chevron* into the criminal context, suggesting that lower courts may do indirectly what this Court forbids them from doing directly. Sanford N. Greenberg, *Who Says It's a Crime?: Chevron Deference to Agency Interpretations of Regulatory Statutes That Create Criminal Liability*, 58 U. Pitt. L. Rev. 1, 3 (1996) (arguing that Chevron deference should not be subject to proposed exceptions for the strict interpretation of criminal and deportation statutes); Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 Harv. L. Rev. 469, 469 (1996).

Agencies also receive deference under *Auer* v. *Robbins*, 519 U.S. 452 (1997), for their interpretations of those regulations. Even if this Court limits the scope of *Chevron* and *Auer* deference, the lower courts may be slow to change their ways, which could result in wrongful convictions that go unremedied for years if they are remedied at all.

The increasing intrusion of federal criminal law into areas long reserved for the States provides another reason to enforce nondelegation principles in the criminal context. This Court has addressed and corrected some instances where Congress has intruded too far into the police power of the states by adding federal punishment to conduct, including violent crime, that is quintessentially local. See, *e.g.*, *Jones* v. *United States*, 529 U.S. 848 (2000) (arson); *United States* v. *Morrison*, 529 U.S. 598 (2000) (assault and battery). Taking steps to ensure that an act of Congress, rather than an unguided agency decree, is necessary to expand the scope of federal criminal law protects federalism as well as the separation of powers.

The growth of the federal administrative apparatus, and of criminal penalties for regulatory violations, sharpens the need for enforcement of all doctrines relating to the separation of powers. As one commentator has observed, "[t]he abandonment of the Constitution's single modes of exercising legislative and judicial powers has thus allowed the government increasingly to leave behind many of the constitutional limits on such powers, and to leave the public subject to mere administrative command." Philip Hamburger, Is Administrative Law Unlawful? 342 (2014). This case is simpler because the prosecutor received the unlawful delegation of legislative power, but the Court should ensure that the Congress cannot achieve the same result simply by adding another Executive Branch agency to the mix.

B. Delegations of the Legislative Power to Make Criminal Laws Must Provide Constraints More Meaningful Than An "Intelligible Principle."

This Court has recognized that defining crimes is "strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825). The Court has recognized that the degree of specificity required of Congress is greater for criminal statutes. See *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018). The void-for-vagueness doctrine, like the nondelegation doctrine, "is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not." *Ibid.*

For nearly a century, the Court has upheld delegations of legislative power so long as the Congress has provided an "intelligible principle" for the exercise of the delegated power. *J.W. Hampton Jr. & Co.* v. *Unit-*

ed States, 276 U.S. 394, 409 (1928). Regrettably, the standard of intelligibility has shrunk. While once a directive to preserve "fair competition" failed the test, see *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 522 (1935), the Court has since divined an "intelligible principle" from mere authority to regulate in "the public interest." *Whitman* v. *American Trucking Assns.*, 531 U.S. 457, 474 (2001) (citing *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225–226 (1943), and other cases).

If avowed service to the "public interest" is enough, than an "intelligible principle" is no more than an imaginable relation between the text of a statute and the substance of a regulation. The more chameleon-like the statutory terms, the more incapable of failure an agency's articulation of a new crime.

As the Court has suggested, that degree of intelligibility is insufficient to sustain a delegation of the power to define a crime. Without specifying the correct standard, the Court responded to an argument that a higher standard applies to delegations in the criminal context by upholding a statute because it "meaningfully constrains" the Attorney General's power to add drugs to a schedule of unlawful substances. See *Touby v. United States*, 500 U.S. 160, 166 (1991).

A meaningful-constraint standard could provide greater insulation from the risk of an arbitrary exercise of power by the Executive Branch. But that standard itself requires greater articulation if it is not to suffer the same semantic dilution that overtook "intelligible principle."

Before joining this Court, Justice Gorsuch suggested three concrete elements of a meaningful con-

straint: "(1) Congress must set forth a clear and generally applicable rule * * * that (2) hinges on a factual determination by the Executive * * * and (3) the statute provides criteria the Executive must employ when making its finding." *United States v. Nichols*, 784 F.3d 666, 673 (Gorsuch, J., dissenting from denial of rehearing en banc).

A slightly different, but consistent formulation would require the Congress must make every meaningful policy choice underlying a criminal statute. The agency could do no more than make factual findings that, by regulation, bring specific conduct or material within a criminal prohibition. As the Court has observed (though in a decision that honored the stated principles in the breach), "[t]he essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct." *Yakus v. United States*, 321 U.S. 414, 424 (1944).

At a minimum, Congress must define a crime sufficiently that a reasonable citizen could deduce that particular conduct likely would come within the prohibition. And of course no citizen could make that inference without having concrete statutory guidance as to the analysis the agency must use to determine what is a crime and what is not.

C. An "Intelligible Principle" Must Do More Than Identify the Subject Matter for Delegated Lawmaking.

If the Court does not replace the "intelligible principle" formulation for delegations in the criminal context, it must require the Congress make more than the mere abstract "principle" behind a statute "intelligible" to the agency, the courts, and the citi-

zens that otherwise must guess at what is or will be a crime when regulations issue.

At a minimum, a reading of the statute must reveal whether any new conduct will become criminal, and explicitly define the factors that must enter into the agency's decision. That was what the Court required in *Touby*, where the Attorney General was "'required to consider'" three factors" before adding a new substance to a schedule of illegal drugs: "the drug's 'history and current pattern of abuse'; '[t]he scope, duration, and significance of abuse'; and '[w]hat, if any, risk there is to the public health. [21 U.S.C.] §§ 201(c)(4)-(6), 201(h)(3), 21 U.S.C. §§ 811(c)(4)-(6), 811(h)(3)." 500 U.S. at 166. In our view, even the factors at issue in *Touby* do little more than identify subject matters for agency inquiry and policy choice. As a model, however, they would add substance to the "intelligible principle" inquiry.

D. The Delegation Here Cannot Be Sustained Under Any Standard.

No matter what standard the Court chooses, the delegation in Section 20913(d) is unconstitutional. That statute delegates the most fundamental policy choice to the Executive without any constraints at all on the Attorney General's exercise of discretion. As obviously, there is nothing in the statute that resembles the factors at issue in *Touby*. And there is no "intelligible principle" under any standard because the Attorney General received complete discretion to determine whether to criminalize the conduct, and how and to what degree. If did what the Congress did not do, and chose to make the registration requirement retroactive, he could credit those with older convictions with time that otherwise would determine the length of the registration obligation. He

could require an offender who had been released 20 years before SORNA nonetheless to register for 25 years after enactment. And, as the petitioner pointed out (Pet. Br. 8-11), one or another Attorney General took all of these positions.

There is nothing "intelligible"—or constitutional—about that.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 17-6086

IN THE

Supreme Court of the United States

HERMAN AVERY GUNDY,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Sex Offender Registration and Notification Act's delegation to the Attorney General in 34 U.S.C. § 20913(d) (formerly 42 U.S.C. § 16913(d)) violates the constitutional nondelegation doctrine.

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18 U.S.C. § 2250(a)(2)(A) 4

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A (recodified at 18 U.S.C. § 3599), and the Sixth Amendment to the United States Constitution. The NAFD is a nationwide, non-profit, volunteer organization whose membership comprises attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. One of the guiding principles of the NAFD is to promote the interests of justice by appearing as amicus curiae in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. NAFD has appeared as amicus curiae in numerous cases challenging Congress's power to enact criminal provisions or statutes affecting criminal offenders, including *United States v. Comstock*, 560 U.S. 126 (2010), and *Jones v. United States*, 529 U.S. 848 (2000). Each year, federal defenders represent tens of thousands of individuals in federal court, including hundreds who are subject to the registration requirements of SORNA. Federal defenders have challenged Congress's Commerce Clause authority to enact SORNA in hundreds of cases. *See, e.g.*, *United States v. Whaley*, 577 F.3d 254 (5th Cir. 2009); *United States v. Gould*, 568 F.3d 459 (4th Cir. 2009); *United States v. May*, 535 F.3d 912 (8th Cir. 2008).

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1. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* made such a monetary contribution. Letters of consent to the filing of this *amicus* brief from counsel for Petitioner and Respondents are on file with the author.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question certified in this case is whether Congress's delegation to the Attorney General to decide questions regarding the retroactivity of the Sex Offender Registration and Notification Act (SORNA) violates the Constitution's nondelegation doctrine. Amicus contends that, within that question, is another one: whether Congress had the constitutional authority, in the first instance, to require individuals like Mr. Gundy to register as sex offenders. Amicus contends that the sex-offender registration requirement that led to Mr. Gundy's conviction is not a proper exercise of Congress's Commerce Clause authority. Although this issue was not raised in the court of appeals, or explicitly articulated in the petition's framing of the issue, it is fairly included in the certified issue. *See* Supreme Court Rule 14.1(a). In addition, this Court has recognized that, even apart from its rules, it may consider issues that have not been preserved in the court of appeals or certified by this Court itself. *Vance v. Terrazas*, 444 U.S. 258 n.5 (1980); *see also Teague v. Lane*, 489 U.S. 288, 300 (1989) (considering issue presented only in amicus brief). Congress's authority to enact SORNA's registration requirement and criminal penalties is fairly included in the delegation question certified in this case. Congress cannot delegate power it does not legitimately possess. Thus, the question falls within that certified by this Court. *See Ohio v. Robinette*, 519 U.S. 33, 38–39 (1996).[2]

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2. The question presented by amicus is a significant one: hundreds of defendants every year are sentenced in federal court for failing to register as sex offenders. In 2016 alone, 425 persons were sentenced under the failure-to-register guideline. U.S. Sentencing Comm'n, "Use of Guidelines and Specific Offense Characteristics,

In SORNA, Congress requires that all persons convicted of a "sex offense" place their name on a state registry.[3] Failure to comply is an element of a federal offense. Amicus argues that Congress's registration requirement exceeds its enumerated authority and must be stricken.

The Commerce Clause does not empower Congress to require defendants convicted of purely local offenses under state law to register as sex offenders. SORNA's registration requirement does not regulate within any of three categories of commercial activity this Court has identified as permissible subjects of regulation. It plainly does not regulate the channels of interstate commerce or the instrumentalities or people in commerce.

Nor does SORNA regulate activities that substantially affect commerce. Even in its broadest reading of this category of commerce, this Court has required that the activity regulated be economic in nature. SORNA's registration requirement has no commercial character.

Nor did Congress identify a jurisdictional hook or make findings that might assist this Court in connecting the registration requirement to interstate commerce. The provision criminalizing registration offenses, 18 U.S.C.

Offender Based, Fiscal Year 2016," located at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2016/Use_of_SOC_Offender_Based.pdf (last accessed May 20, 2018).

3. The Adam Walsh Act, originally 42 U.S.C. §§ 16901-16962, was transferred to 34 U.S.C. §§ 20901-20962, effective September 1, 2017. *See* http://uscode.house.gov/editorialreclassification/t34/index.html.

§ 2250, contains a scant jurisdictional element—punishing those who fail to register and travel in commerce or were convicted of federal, District of Columbia, or tribal offenses. 18 U.S.C. §2250(a)(2)(A), (B). But there is no "hook" in the provision creating the pool of potential offenders. Indeed, in articulating a purpose for the sex offender registry, Congress did not even attempt to identify any relationship to interstate commerce. It said only that it aimed to "protect the public from sex offenders and offenders against children." 34 U.S.C. § 20901.

To be sure, Congress has broad authority to enact legislation that is "necessary and proper" to the exercise of its enumerated powers. This "necessary and proper" power cannot justify SORNA's registration requirements.[4] These requirements are not incidental to any legitimate exercise of Congress's commerce power. Instead, the registry is a predicate for Congress's attempt to expand its police power under the guise of legitimate Commerce Clause legislation. As the Chief Justice has observed, Congress may not create the activity that it seeks to regulate under its commerce authority.

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4. The Second, Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh circuits have upheld SORNA's registration requirement as necessary and proper to Congress's commerce power. But four federal district courts have held that the requirement has no constitutional support. *See United States v. Myers*, 591 F. Supp. 2d 1312 (S.D.Fla. 2008), *vacated*, 534 F.3d 1349 (11th Cir. 2009) (per curiam); *United States v. Hall*, 577 F. Supp. 2d 610, 622 (N.D.N.Y. 2008), *rev'd*, *United States v. Guzman*, 591 F.3d 83 (2d Cir. 2010); *United States v. Waybright*, 561 F. Supp. 2d 1154 (D. Mont. 2008), *disapproved of*, *United States v. George*, 625 F.3d 1124 (9th Cir. 2010); *United States v. Powers*, 544 F. Supp. 2d 1331 (M.D. Fla. 2008), *vacated*, 562 F.3d 1342 (11th Cir. 2009).

In enacting national registration requirements for local criminal convictions that have no connection with commerce, Congress has impermissibly reached into an area reserved for the States to regulate. Even when Congress has articulated sound policy for such broad regulation, this Court has intervened to ensure that Congress does not exploit its Commerce Clause authority to regulate "all private conduct." The Court should similarly intervene here and strike the registration requirement.

The statute under which Mr. Gundy is convicted applies only to defendants who are "required to register under the Sex Offender Registration and Notification Act." 18 U.S.C. § 2250(a)(1). Congress could not constitutionally require Mr. Gundy, who was convicted of a Maryland offense, to register under SORNA. Since Congress lacks the power to require Mr. Gundy to register in the first place, § 2250(a) is unconstitutional.

ARGUMENT

I. Congress's Commerce Clause Power Does Not Support SORNA's Sweeping Exercise of Police Power

The Constitution creates a federal government "acknowledged by all to be one of enumerated powers." *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819); *see also Gibbons v. Ogden*, 22 U.S. 1, 195 (1824) (observing "[t]he enumeration presupposes something not enumerated"). This Court has been mindful of James Madison's observation regarding the allocation of powers under our Constitution: "the powers delegated by the

proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *United States v. Lopez*, 514 U.S. 549, 552 (1995) (quoting The Federalist No. 45, pp. 292-93 (C. Rossiter ed. 1961)). This principal of federalism preserves liberty: "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

Among the enumerated powers delegated to the federal government is the authority granted in the Commerce Clause. That provision allows Congress "[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." U.S. Const. Art. I, § 8, cl. 3. Although this power has been invoked to support federal incursions into policing crime, this Court has insisted that the authority must focus on commerce's economic nature. Indeed, in *Lopez*, Justice Kennedy rejected Congress's reliance on the Commerce Clause to regulate "an activity beyond the realm of commerce in the ordinary and usual sense of that term" because exercising authority in that way foreclosed "the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). In the same case, Justice Thomas wrote, "we *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that

there are real limits to federal power. . . . The Federal Government has nothing approaching a police power." *Id.* at 584 (Thomas, J., concurring) (emphasis in original).

Since 2007, the Government has defended the sweeping exercise of congressional power reflected in SORNA's registration and criminal provisions as a valid exercise of its authority under the Commerce Clause. SORNA does not itself explain under what authority Congress imposes its registration requirements. The requirements neither contain a jurisdictional element nor regulate commerce. Likewise, they do not, on their face, regulate interstate commerce. The courts have "assumed that Congress has invoked its Commerce Clause power" to enact the registration requirement. *Myers*, 591 F. Supp. 2d at 1331. Congress has given no indication rebutting that assumption. But the widely acknowledged constitutional support for the requirement is insufficient. A long history of Commerce Clause jurisprudence makes clear that Congress does not have the power to regulate individuals convicted of purely intrastate offense. Therefore, SORNA is an improper exercise of the commerce power. *Lopez*, 514 U.S. 549; *United States v. Morrison*, 529 U.S. 598 (2000); *Jones v. United States*, 529 U.S. 848 (2000).

From the beginning of its Commerce Clause jurisprudence, the Court was careful to note that the term "commerce" did not authorize unlimited power. Rather, it was a term with a discrete meaning: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by the prescribing rules for carrying on that intercourse." *Gibbons*, 22

U.S. at 189–90. To determine whether Congress's acts are properly tethered to this meaning, the Court "has identified three broad categories of activity that Congress may regulate under its commerce power." *Morrison*, 529 U.S. at 608–609 (internal quotation marks omitted). First, Congress may regulate the use of and channels of interstate commerce, such as interstate highways, the mail, or air traffic routes. *Id.* Second, Congress may regulate and protect the instrumentalities of interstate commerce or persons or things in interstate commerce. *Id.* Finally, Congress can regulate those activities that have a substantial effect on interstate commerce. *Id.* The registration requirements cannot be upheld under the first two categories: they have nothing to do with the channels of interstate commerce, and they are imposed on individuals who need not have engaged in interstate commerce or even have any connection to commerce. The registration requirements can therefore be upheld only if they regulate "those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558–59; *see also United States v. Robertson*, 514 U.S. 669 (1995) (per curiam) ("The 'affecting commerce' test was developed in our jurisprudence to define the extent of Congress's power over purely *intra*state commercial activities that nonetheless have substantial *inter*state effects.") (emphasis in original); *Waybright*, 561 F. Supp. 2d at 1164 (Government initially relied on "substantially affects commerce" basis to argue registration requirement fell within commerce power). Even under this Court's broadest application of the "substantially affects" category, the registration requirement fails.

Lopez and *Morrison* set forth several factors to analyze whether a regulation can be upheld as an activity

that substantially affects interstate commerce. *Lopez*, 514 U.S. at 559–63; *Morrison*, 529 U.S. at 610–13. None of those factors supports the registration requirement.

First, the regulated activity must be economic in nature. This factor is decisive and central to Commerce Clause authority. *Morrison*, 529 U.S. at 611 ("*Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."). The requirement that the activity be economic has sometimes stymied Congress's attempts to pass statutes addressing crime. *See, e.g.*, *Morrison*, 529 U.S. at 598 (striking civil penalties for violence-against-women offenses); *Lopez*, 514 U.S. at 549 (striking statute criminalizing gun possession near schools). Congress has "broad authority" to create crimes—*United States v. Comstock*, 560 U.S. 126, 135–36 (2010)—but only when exercising its enumerated powers. Otherwise, this Court has emphasized that the "States possess primary authority for defining and enforcing the criminal law." *Lopez*, 514 U.S. at 560 n.3 (internal quotation marks omitted). To ensure that the primary power rests firmly with the States, the Court has carefully examined Congress's assertion of commerce power in this area. In *Lopez*, for example, the Court struck the Gun-Free School Zones Act because "neither the actors nor their conduct ha[d] a commercial character, and neither the purposes nor the design of the statute ha[d] an evident commercial nexus." 514 U.S. at 559–60. The Act "by its terms has nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 561. Similarly, in *Morrison*, Congress

created a federal civil remedy for victims of gender-motivated crimes of violence. 529 U.S. at 605. This Court struck that provision because it did not regulate economic activity. *Id.* at 613.

Congress's attempt to police sex offenders should be similarly circumscribed. Congress "remain[s] unable to regulate noneconomic conduct that has only an attenuated effect on interstate commerce and is traditionally left to state law." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 614 (Ginsburg, J., concurring in part, dissenting in part) (*NFIB*) (citing *Lopez*, 514 U.S. at 567; *Morrison*, 529 U.S. at 617–19). SORNA's registration requirements have no commercial character nor any relation to economic activity of any kind. This conclusion is evident simply from a reading of the statute itself. The "Declaration of Purpose" informs that SORNA was enacted "to protect the public from sex offenders and offenders against children." 34 U.S.C. § 20901. That purpose does not address economic activity. Congress has no power to exercise a broad police power to protect the public. *See United States v. Kebodeaux*, 570 U.S. 387, 402 (2013) (Roberts, C.J., concurring) (noting Court's longstanding resistance to assertions of congressional power to protect the public). Because the registration requirement has "nothing to do with commerce," it cannot be supported as a lawful exercise of Congress's Commerce Clause power. *Lopez*, 514 U.S. at 560 (quotation marks omitted); *see also Morrison*, 529 U.S. at 614 (Court has upheld federal regulation of intrastate activity "only where that activity is economic in nature").

The second factor examined in *Lopez* and *Morrison* is whether the statute contains a "jurisdictional element,"

such as a requirement of travel across state lines for the purposes of committing the regulated act. *Morrison*, 529 U.S. at 611–12. The registration requirements contain no such jurisdictional element. 34 U.S.C. §§ 20913-20916. Instead, the registration requirements, unlike the provision criminalizing the failure to comply with them, apply to offenders whose criminal activities are purely intrastate. *See Waybright*, 561 F. Supp. 2d at 1165; 18 U.S.C. § 2250(a). Under this Court's precedent, an express jurisdictional element "might limit [the provision's] reach to a discrete set of [sex offenders] that additionally have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 561–62. For example, a requirement that persons who were first convicted of a local sex offense and then traveled in interstate commerce must register would come closer to the mark. *Id.* at 561 (recognizing that § 922(q) lacked any jurisdictional element to ensure "case-by-case inquiry" into commerce nexus). Congress, however, made no attempt to constrain its registration reach to activity connected to interstate commerce.

Legislative findings are another factor courts consider in assessing Commerce Clause authority. Findings demonstrating a connection to commerce will at least enable a court "to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce." *Lopez*, 514 U.S. at 563.[5] Congress included

5. Legislative findings do not guarantee that the statute will be upheld as a valid exercise of congressional power. The Violence Against Women Act, at issue in *Morrison*, was accompanied by "numerous findings regarding the serious impact that gender-motivated violence has on victims and their families." *Morrison*, 529 U.S. at 614. The Court still struck down the statute, ruling that "the existence of congressional findings is not sufficient, by itself,

such findings in other sections of the Adam Walsh Act. For example, Title V of the Act, entitled "Child Pornography Prevention," contains findings that "intrastate incidents of production, transportation, distribution, receipt, advertising, and possession of child pornography, as well as the transfer of custody of children for the production of child pornography, have a substantial and direct effect upon interstate commerce . . . ." Pub. L. No. 109-248, tit. V, sec. 501, 109 Stat. 587, 623. Title I of SORNA, including its registration requirement, contains no such findings. *Id.* at Tit. I. Like the Gun Free School Zone Act, *Lopez*, 514 U.S. at 562-63, SORNA is unsupported by legislative findings indicating that purely local sex crimes have any link with interstate commerce: "SORNA's legislative history contains no express congressional findings regarding the effects of sex offender registration on interstate commerce." *Waybright*, 561 F. Supp. 2d at 1165.

Congress may not compel registration in anticipation of possible interstate travel. In *NFIB*, the Government argued that requiring individuals to purchase health insurance was proper under the Commerce Clause because everyone, at some point, is a consumer of health care. *Nat'l Fed. of Indep. Bus.*, 567 U.S. at 557 (Roberts, C.J.). Five justices rejected projected economic future

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to sustain the constitutionality of Commerce Clause legislation." *Id.* Rather, the Court instructed the determination of whether an activity sufficiently affects interstate commerce is for the judiciary. *Id.* "Moreover, although the statute was supported by express congressional findings regarding the effects upon interstate commerce of gender-motivated violence, the congressional findings relied on the same 'cost of crime' and 'national productivity' arguments the Court rejected in *Lopez*." *Waybright*, 561 F. Supp. 2d at 1164 (citing *Morrison*, 529 U.S. at 614–15).

activity as the basis for Commerce Clause authority. As Chief Justice Roberts wrote, "The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent. . . . Each one of our cases . . . involved pre-existing economic activity." *Id* (citations omitted) (Roberts, C.J.); *see also id.* at 657 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) ("But if every person comes within the Commerce Clause power of Congress to regulate by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end."). In just the same way, Congress may not dictate registration based on predictions of travel or other speculated effects on interstate commerce.

Finally, this Court will examine the extent of the relationship between the regulated activity and its effects on commerce. *Morrison*, 529 U.S. at 612. Of course, the closer the connection, the more likely the Court will find that that Congress has not tread into an area reserved for state regulation. *See id.* (connection cannot be attenuated). Here, there is no indication in the statute, or anywhere else, that offenders subject to the registration obligation imposed by SORNA have any effect on commerce at all, not even an attenuated one. Rather, the registration requirements regulate "a person who is a sex offender without reference to any activity affecting—or not affecting—interstate commerce that he may undertake." *Myers*, 591 F. Supp. 2d at 1335.

SORNA's registration requirements exceed even the broadest permissible conception of Congress's authority over interstate commerce. At the furthest boundary of its power, Congress may regulate purely intrastate economic

activity if that activity, in the aggregate, would have a substantial effect on interstate commerce. *Wickard*, 317 U.S. at 125; *accord Gonzalez v. Raich*, 545 U.S. 1 (2005). In *Wickard*, this Court famously upheld a federal provision prohibiting an Ohio farmer from growing wheat on his own property, for his own consumption. *Wickard*, 317 U.S. at 114. It did so based on the principle that purely intrastate activity may, when aggregated, have a substantial effect on interstate commerce. *Id.* at 128–29. That decision has "always has been regarded as the ne plus ultra of expansive Commerce Clause jurisprudence." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 648 (Scalia, Kennedy, Thomas, Alito, J.J., dissenting); *see also Lopez*, 514 U.S. at 560 (*Wickard* "is perhaps the most far reaching of Commerce Clause authority over intrastate activity").

But, as far as Congress reached, it did not reach outside the bounds of economic activity. *Wickard*, 317 U.S. at 125 (Congress may regulate activity that "exerts a substantial economic effect on interstate commerce"); *Lopez*, 514 U.S. at 560 (*Wickard* "involved economic activity"). *Wickard* represents the outmost limit of Congress's authority in this category: Congress may be able to regulate purely intrastate economic or commercial activity if that activity, when aggregated, substantially affects interstate commerce. *Id.*; *see also Morrison*, 529 U.S. at 617 (rejecting the application of the aggregation principle to intrastate non-economic activity). *Lopez* emphasized that the *Wickard* aggregation principle

> may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate

> the distinction between what is national and what is local and create a completely centralized government.

Lopez, 514 U.S. at 556–57 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

An effect on commerce cannot be reached by extrapolating the aggregate economic effects that sex crimes and sex offenders inflict upon society. The Court has flatly rejected the notion that Congress can regulate noneconomic intrastate criminal conduct based solely on the purported aggregate effect on interstate commerce. *Morrison*, 529 U.S. at 617. Nor can the "costs of crime" or the effects of crime on "national productivity" support the use of the Commerce Clause to regulate intrastate criminal activity. *Lopez*, 514 U.S. at 563-64; *Morrison*, 529 U.S. at 598, 612–13. In *Lopez*, the government maintained that school-zone firearm possession would increase the cost of insurance, inhibit interstate travel, and hinder education. 514 U.S. at 563–64. "The Court rejected these attenuated effects recognizing that acceptance of the argument would grant Congress unlimited power under the Commerce Clause." *Lopez*, 514 U.S. at 563–64; *Waybright*, 561 F. Supp. 2d at 1164 (citing *Lopez*).

The Court's most recent application of the aggregation doctrine, in *Taylor v. United States*, 136 S. Ct. 2074 (2016), does not bring SORNA within Congress's authority. *Taylor* addressed the nature of the evidence required to prove the commerce element under the Hobbs Act, 18 U.S.C. § 1951(a), in a case involving robbery of drug proceeds. 136 S. Ct. at 2077–78. Ten years earlier, in *Gonzales v. Raich*, 545 U.S. 1 (2005), the Court had

decided that Congress had the power to regulate the "national market for marijuana," through the Controlled Substance Act (CSA), based on its "aggregate effect on commerce." *Taylor*, 136 S. Ct. at 2077–78. Relying on *Raich*, the *Taylor* Court noted that "the sale of marijuana is undoubtedly an "economic activity," and held that, if Congress had the power to regulate its market, it also had the power to regulate robberies within that market. *Id.* at 2080.

This conclusion is consistent with the limit established by *Wickard*. Because marijuana is a commodity that has an interstate market, the CSA is connected to "economic" activity and is therefore a valid exercise of Congress' Commerce Clause powers:

> Unlike those at issue in *Lopez* and *Morrison* the activities regulated by the CSA are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." Webster's Third New International Dictionary 720 (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.

Raich, 545 U.S. at 25–26. Commerce is crucial to the constitutionality of a regulatory scheme that purports to regulate intrastate conduct: when "a general regulatory statute bears a substantial relation to commerce, the *de*

minimis character of individual instances arising under that statute is of no consequence." *Id.* at 23 (quoting *Lopez*, 514 U.S. at 558); *see also Myers*, 591 F. Supp. 2d at 1334; *Waybright*, 561 F. Supp. 2d at 1166.

SORNA's registration requirement does not regulate economic activity, nor does it regulate channels of interstate commerce. SORNA's registration requirement is not economic or commercial in any sense, not individually and not in the aggregate. Its aim is to exercise federal police power under the aegis of protecting the public, and it attempts to do so by regulating individual, intrastate activity that stands completely apart from interstate commerce. Not even the most expansive application of the Commerce Clause power supports it.

II. The Registration Requirement Is Not Necessary and Proper to Congress's Exercise of Its Commerce Power.

The "Necessary and Proper Clause" extends Congress's authority to act in furtherance of executing its enumerated powers. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 537. The clause, however, is not without limits, and Congress exceeded them in enacting SORNA's registration requirement.

Any exercise of the Necessary and Proper Clause must be an exercise "of authority derivative of, and in service to, a granted power." *Id.* at 560 (Roberts, C.J.). This Court looks to determine whether the exercise is "narrow in scope," or "incidental" to the commerce power. *See id.* The power exercised here is neither narrow nor incidental. *See United States v. Thomas*, 534 F. Supp. 2d

912, 921–22 (N.D. Iowa 2008) (while upholding registration requirement under Necessary and Proper Clause, noting that it was not "narrowly tailored or absolutely necessary" to Congress's ability to monitor sex offenders). The registration requirement is certainly not narrow. It is not imposed "in a small fraction" of cases, as was the power addressed in *Comstock*, 560 U.S. at 148 (federal prisoners held beyond their sentences for mental health reasons in a fraction of cases). Rather, every person convicted of a sex offense must register—regardless whether they have traveled in commerce. 34 U.S.C. § 20913.

Nor is the registration requirement "incidental" to Congress's Commerce Clause power.[6] The registry was not created as an ancillary or logically derivative support for Congress's exercise of commerce authority; instead, it was enacted to create the necessary predicate to the exercise of its power. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 560 (Roberts, C.J.). In *NFIB*, Congress imposed a requirement on all individuals to purchase health insurance. Congress did not, as it does when it properly exercises its authority under the Necessary and Proper Clause, "regulate under the Commerce Clause those who by some preexisting activity bring themselves within the sphere of federal regulation." *Id.* Rather, Congress brought people within that sphere, whether they chose to be there or not. *Id.* By contrast, the local cultivation of marijuana addressed in *Raich* was a means to an appropriate federal end under the Commerce Clause—the

6. In *United States v. Kebodeaux*, this Court concluded that the civil registration requirement was necessary to Congress's power to regulate the military–a different power than that at issue here. 570 U.S. at 395.

regulation of a national market in fungible commodities. 545 U.S. at 19.

Registration under SORNA is not a means to an end, "it *is* the end of SORNA." *Waybright*, 561 F. Supp. 2d at 1166 (emphasis added). To achieve the goal of registering all sex offenders, Congress impressed upon the States a policy determination traditionally left to them. Congress assumed a federal police power to determine how to best protect the public against sex offenders, displacing the States in an area they have long regulated. Then, under § 2250 and its jurisdictional hook, Congress has sought to enforce the requirement by criminalizing the failure to act. As *NFIB* illustrates, the registration may be a "necessary" predicate to the criminal provision, but it is not a proper one. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 560 (Roberts, C.J.)

Local sex offender registration is not economic activity. The registration provision "has nothing to do with commerce or any sort of economic enterprise; it regulates purely local, non-economic activity." *Waybright*, 561 F. Supp. 2d at 1164. "It is impossible to read SORNA ... as regulating an economic market." *Myers*, 591 F. Supp. 2d at 1332. Accordingly, the registration requirement must be stricken.

III. The Broad Power Exercised in Enacting SORNA Upsets the Balance of State and Federal Authority.

Federalism—the idea that the power ceded by the people is exercised by two, distinct governments—was of preeminent importance to our Founders: "In the compound republic of America, the power surrendered by the people

is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will control itself." The Federalist No. 51, p. 323 (C. Rossiter ed. 1961) (J. Madison), *cited in Lopez*, 514 U.S. at 576. Under principles articulated by this Court, SORNA's registration requirement, untethered to any of Congress's enumerated powers, violates this allotment of power.

Section 20913 compels activity: a federal requirement for Mr. Gundy to register as a sex offender for being convicted of a Maryland state crime. In *NFIB*, the opinions of Chief Justice Roberts and Justice Scalia, joined by Justices Kennedy, Thomas, and Alito, recognized that a law compelling, as SORNA does, non-economic activity cannot be justified as an exercise of Congress's Commerce Clause Power. 567 U.S. at 549, 552 (Roberts, C.J.); *id.* at 649 (Scalia, Kennedy, Thomas and Alito, J.J., dissenting). It follows that Congress cannot use its Commerce Clause powers to compel those convicted of state sex offenses to act.

Section 20913 attempts to do what Chief Justice Roberts rejected in *NFIB*: it demands that individuals register as sex offenders for state crimes. "Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority." *Id.* at 552 (Roberts, C.J.). Section 20913's registration requirement improperly "vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power." *Id.* at

560 (Roberts, C.J.). Congress cannot "regulate commerce that does not exist by compelling its existence." *Id.* at 649 (Scalia, Kennedy, Thomas, and Alito, J.J., dissenting). "[I]t must be activity affecting that commerce that is regulated, and not merely the failure to engage in commerce." *Id.* at 658. Section 20913 does not regulate existing economic activity; it forces individuals convicted of purely state offenses to register (the activity) for the sole purpose of creating the federal crime of failing to register.[7] The Commerce Clause does not authorize such congressional overreach; otherwise, it would "extend federal power to virtually everything." *Id.* at 657. Sex offense registration, or non-registration, cannot be defined as economic activity. There is no market for sex offenders. "Such a definition of market participants is unprecedented, and were it to be a premise for the exercise of national power, it would have no principled limits." *Id.*; *contrast Raich*, 545 U.S. at 45.

Sex offender registration originated in the states. *See* Wayne A. Logan, "Criminal Justice Federalism and National Sex Offender Policy," 6 OHIO ST. J. CRIM. L. 51, 60–62 (2008) (describing history of registration laws). Indeed, SORNA implicitly recognizes that the power properly rests with the states, by commanding compliance with state registries. 34 U.S.C. § 20913(a); *cf. Lopez*, 514 U.S. at 584 (Thomas, J., concurring) ("we *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power") (emphasis in original). It upsets the

7. Section 20913 was not designed to create a discrete federal crime. In subsection (e), Congress specifically told states to create the penalty for failing to register. Implicit is congressional awareness of its own limitations and the traditional role and rights of states to enforce police powers.

balance of powers between the two governments for Congress to usurp police power reserved for the states by ordering registration, an activity (or non-activity) that is non-commercial and has no economic consequence. *Id.* at 583. (Kennedy, J., concurring) ("The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term.").

In SORNA, Congress regulates a wide swath of behavior that properly falls within the states' power to regulate. It requires, as a federal matter, individuals who are "sex offenders" to register and maintain current information in each local jurisdiction: (a) where the sex offender was convicted, (b) where the sex offender resides, (c) where the sex offender is employed, and/or (d) where the sex offender attends school. 34 U.S.C. § 20913(a). It requires that the individual register prior to his release from prison, or if he was not imprisoned, no later than three business days after sentencing. *Id.* at § 20913(b). And it mandates that the offender update registration within three days after a change in name, residence, employment or student status. *Id.* at § 20913(c). It imposes requirements on the states that intrude, as a federal matter, on offenders' privacy interests. It requires, for example, that every state establish an internet website, publishing information about sex offenders registered in that state, that each jurisdiction include in the design of its own website all field search capabilities needed for full participation in the National Sex Offender Public Website, and that each jurisdiction "participate in that website as provided by the Attorney General." *Id.* at

§ 20920(a). Congress may have good reasons for making these policy choices, but blurring or, as here, discarding, the lines drawn by the Founders in creating a system of dual sovereignty is impermissible:

> "[E]ven [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'" *Id.* at 556–557 (quoting *Jones & Laughlin Steel*, supra, at 37, 57 S. Ct. 615).

Lopez, 514 U.S. at 557; *see also Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 538 (Court's respect for Congress's policy decisions cannot extend to ignoring restraints on federal power). "Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed and that this Court is obliged to enforce." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

Imposing a federal obligation to register threatens federalism and the constitutional "order because it gives such an expansive meaning to the Commerce Clause that

all private conduct (including failure to act) becomes subject to federal control, effectively destroying the Constitution's division of governmental powers." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 658 (Scalia, Kennedy, Thomas Alito, J.J., dissenting). The Commerce Clause does not permit Congress to require defendants convicted of purely state offenses to register as sex offenders. The registration requirements contained in 34 U.S.C. §§ 20913-20918 are unconstitutional. The statute under which Mr. Gundy is convicted applies only to defendants who are "required to register under the Sex Offender Registration and Notification Act." 18 U.S.C. § 2250(a)(1). Since Congress lacks the power to require Mr. Gundy to register in the first place, § 2250(a) is likewise unconstitutional. *See Ward v. Illinois*, 431 U.S. 767, 774 (1977) (unconstitutional statute cannot serve as predicate for conviction).

CONCLUSION

By compelling individuals who have no connection to commerce to register or be subject to a federal conviction, Congress has exceeded its authority. Because Congress had no authority to exercise the power it has improperly delegated, SORNA's registration requirements should be stricken.

Respectfully submitted,

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In the Supreme Court of the United States

HERMAN AVERY GUNDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Jesse H. Choper, *Judicial Review and the National Political Process* (1980) 20
The Federalist (Liberty Fund ed. 2001) 15
Philip Hamburger, *Is Administrative Law Unlawful?* (U. Chicago Press 2014) 9, 23, 27
Philip Hamburger, *Law and Judicial Duty* (Harvard U. Press 2008) 24
James M. Landis, *The Administrative Process* (1966) 11
James Madison, 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathan Elliot ed., 2d ed., 1836) 32
Montesquieu, *The Spirit of the Laws* (1748) 23
Eric A. Posner and Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721 (2002) 11
David Schoenbrod, *Power Without Responsibility* (Yale U. Press 1993) 13, 15–16
Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303 (1999) 18

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In the Supreme Court of the United States

No. 17-6086

HERMAN AVERY GUNDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS[1]

The New Civil Liberties Alliance (NCLA) is a nonprofit, public-interest law firm founded to challenge multiple constitutional defects in the modern administrative state through original litigation, amicus curiae briefs, and other means. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be

1. All parties consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

tried in front of an impartial and independent judge, and the right to have laws made by the nation's elected lawmakers through constitutionally prescribed channels rather than by prosecutors or judges taking illicit unconstitutional shortcuts. Yet these selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, the Department of Justice, and federal administrative agencies have trampled them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern. NCLA is particularly disturbed that a series of Attorneys General has accepted a divestiture of legislative power from Congress. They have then enforced criminal sanctions against offenders like Mr. Gundy based on the "laws" those same Attorneys General have created—all in blatant violation of those offenders' constitutional liberties.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 1: "All legislative Powers herein granted shall be vested in a Congress of the United States."

U.S. Const. art. II, § 2: "The President . . . may require the Opinion, in writing, of the principal Officer in

each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."

U.S. Const. art. II, § 3: "[The President] shall take Care that the Laws be faithfully executed."

34 U.S.C. § 20913(d): "Initial registration of sex offenders unable to comply with subsection (b). The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b)."

28 C.F.R. § 72.3: "Applicability of the Sex Offender Registration and Notification Act. The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.

"Example 1. A sex offender is federally convicted of aggravated sexual abuse under 18 U.S.C. 2241 in 1990 and is released following imprisonment in 2007. The sex offender is subject to the requirements of the Sex Offender Registration and Notification Act and could be held criminally liable under 18 U.S.C. 2250 for failing to register or keep the registration current in any jurisdiction in which the sex offender resides, is an employee, or is a student.

"Example 2. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required but relocates to another state in

2009 and fails to register in the new state of residence. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in any jurisdiction in which he resides, and could be held criminally liable under 18 U.S.C. 2250 for the violation because he traveled in interstate commerce."

SUMMARY OF ARGUMENT

The judgment of the court of appeals should be reversed for four separate and independent reasons. First, 34 U.S.C. § 20913(d) violates the Constitution by divesting Congress of legislative powers and transferring those powers to the Attorney General. Second, § 20913(d) fails to provide an "intelligible principle" to guide the Attorney General's discretion, as current doctrine of this Court requires. Third, the Constitution does not allow the Attorney General to simultaneously create and execute a rule like 28 C.F.R. § 72.3 that he is charged with enforcing. Fourth, the Constitution does not permit criminal offenses to be defined in administrative rules rather than statutes.

The vesting clauses of Articles I, II, and III protect the civil liberties of Americans by separating the constituent parts of the power to punish criminally. They ensure that no defendant can be imprisoned for committing a federal crime unless the legislature has first defined the crime, and all three branches of government have played their part in determining criminal culpability for an offense.

This Court should declare the underlying *statute* unconstitutional if it agrees with Gundy's constitutional arguments. But it is also important to note that the Court

could also or instead take the more modest step of invalidating the Attorney General's *rule* as an unconstitutional executive exercise of legislative power—regardless of whether an Act of Congress purported to authorize this rule.

ARGUMENT

I. CONGRESS MAY NOT DIVEST ITSELF OF THE POWER THAT THE CONSTITUTION VESTS IN IT

Mr. Gundy complains that § 20913(d) violates the "nondelegation doctrine," but that phrase is a misnomer and we urge the Court to abandon it. We also respectfully urge the Court to repudiate the legal fictions that have long sustained statutes that purport to confer lawmaking prerogatives on executive and agency officials. Although § 20913(d) is unconstitutional even under the Court's existing doctrine, this Court should put aside the nondelegation doctrine and its associated legal fictions.

Once the nondelegation doctrine and the associated legal fictions are left aside, it becomes clear that § 20913(d) is unconstitutional. Congress may not divest itself of legislative power—most basically because the Constitution vests this power in Congress, but also because Congress may not evade bicameralism and presentment.

A. The Court Should Abandon the Misleading Term "Delegation"

The doctrine upon which certiorari has been granted has appeared under the names of "nondelegation doctrine," "delegation doctrine," and "anti-delegation

doctrine" over the years. The Court should discard those terms for two separate and independent reasons.

First, it is imprecise and misleading to describe a *statute* that transfers lawmaking powers to the executive as a congressional "delegation" of authority. Second, the phrase "nondelegation *doctrine*" misleadingly implies that the limitations on executive-branch lawmaking are rooted in a court-created doctrine rather than the text of the Constitution.

1. "Delegation" Falsely Implies an Easily Revocable Transfer

When a political or governmental entity "delegates" its powers, it always retains the authority to unilaterally revoke its delegation. A cabinet secretary, for example, who "delegates" statutorily authorized powers to his subordinates has the right to terminate that arrangement at any time, for any reason, and without any need to secure the assent of the delegatee or any other person or institution.

That is not the case when a *statute* purports to confer lawmaking powers on executive or agency officials. Although Congress may revoke this arrangement, it may do so only by repealing or amending the statute through the bicameralism-and-presentment process of Article I, § 7. The President is empowered to veto any effort to withdraw powers that a statute vests in the executive, so Congress cannot unilaterally revoke a transfer of authority that a predecessor Congress made via statute. Congress must obtain the President's assent, or it must secure veto-proof supermajorities in both houses of Congress, before any previous transfer of authority can be undone.

A statutory transfer of lawmaking power to the executive thus ties the hands of Congress. When Congress by statute transfers legislative power to the executive, it cannot recall the transferred power easily. A statutory transfer of legislative power does not merely delegate legislative power, for it limits Congress's freedom to reassert its legislative powers.

Indeed, it is widely accepted that one Congress cannot bind a future Congress except by passing a statute (or ratifying a treaty). So, for example, neither House of Congress can pass a rule that forces a future Congress to follow certain procedures. Yet permitting delegation to the executive allows this forbidden outcome. By transferring legislative power to an executive or agency official like the Attorney General, a current Congress can get that official to enact rules without going through bicameralism and presentment—policies that a future Congress cannot reverse without taking those difficult steps.

2. The Court Should Employ the Constitution's Terminology and Should Therefore Conclude that Congress Has "Divested" Itself of Legislative Power

Article I, § 1 makes clear: "All legislative Powers herein granted shall be *vested* in a Congress of the United States." Statutes that divest Congress of these legislative powers by conferring them upon executive or agency officials are violating the Constitution itself—not mere judicial "doctrine" or precedents. Using the term "nondelegation doctrine" both misdescribes and understates the problem with statutes that give lawmaking powers to agency officials, and the widespread use of this

nomenclature stacks the deck in favor of administrative power and against the judicial enforcement of Article I's vesting clause.

Instead of addressing whether § 20913(d) violates the "nondelegation doctrine," the Court should ask whether § 20913(d) contravenes Article I's vesting clause, which vests "[a]ll legislative powers" in Congress and not other parts of government. The Court's terminology should be no different from the language it employs when discussing statutes that impermissibly transfer Article II powers from the President to Congress. When *Myers v. United States*, 272 U.S. 52 (1926), disapproved a federal statute that forbade the President from removing executive officers without the advice and consent of the Senate, it declared that the statute contravened the vesting and take-care clauses in Article II, not some court-created "non-arrogation doctrine." *See Myers v. United States*, 272 U.S. 52, 163–64 (1926) ("[A]rticle 2 grants to the President the executive power of the government—i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers . . . [A]rticle 2 excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices"); *id.* at 164 ("[T]o hold otherwise would make it impossible for the President, in case of political or other difference with the Senate or Congress, to take care that the laws be faithfully executed.").

The text of the Constitution similarly forbids arrangements that transfer legislative powers from Congress to the executive. A statute cannot reallocate authority that

the Constitution itself has established—regardless of whether the statute is moving executive powers into the legislature or legislative powers into the executive—and statutes that improperly allocate powers among the branches offend the command of the relevant vesting clause, rather than a mere judicial "doctrine" or precedent.

In fact, the Constitution's text is especially clear in forbidding the divestiture of legislative powers—as evident from Article I's first substantive word. The article begins: "*All* legislative Powers herein granted shall be vested in a Congress." If all legislative powers are vested in Congress, they may not be assigned elsewhere. If the grant were merely permissive, not exclusive, there would be no reason for the word "All."[2] That word bars any divesting of legislative power.

When a statute transfers legislative powers to the executive (as in this case)—or when a statute transfers executive powers to the legislature (as in *Myers*)—it is

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2. The use of the word "All" in Article I is unique. In articles II and III when granting executive or judicial power, the Constitution does not employ the word "all." Article II states, "The executive Power shall be vested in a President of the United States of America" and proceeds to provide for the appointment of officers to assist in the administration of executive power. Similarly, Article III contemplates a hierarchical grant of the judicial power which "shall be vested in one supreme Court, and in such inferior Courts as the Congress may ... ordain and establish." By omitting the word "all" in Articles II and III, the Constitution permits the allocation of executive power not only to the President but also to his appointed executive officers, and it enables the judicial power to extend to inferior courts. *Cf.* P. Hamburger, *Is Administrative Law Unlawful?* 387–88 (U. Chicago Press 2014).

"divesting" rather than "delegating" the powers that the Constitution vests in a specific branch of the government. No one would say that President Grant "delegated" his removal powers to the Senate when he signed the law that forbade the removal of postmasters without Senate consent. *See* Act of Congress of July 12, 1876, 19 Stat. 80, 81, *declared unconstitutional in Myers*, 272 U.S. at 107. That is because neither President Grant (nor his successors) could have rescinded this divestiture of presidential power without first persuading Congress to repeal or amend the earlier statute. It is equally misleading to say that Congress has "delegated" its powers by enacting statutes that it cannot revoke without securing the President's assent or overriding his veto.

Article I vests the legislative power in Congress, and statutes that confer these powers on executive or agency officials contravene Article I by "divesting" Congress of its powers and assigning them to other institutions. The Court should eschew its previous "nondelegation" verbiage and use terminology that mirrors what the Constitution says: Legislative powers are "vested" in Congress, and statutes that contradict this command improperly "divest" Congress of Article I powers.

B. The Court Should Repudiate the Three Main Legal Fictions that Have Sustained Congress's Divestiture of Lawmaking Powers to Executive Departments and Agencies

For far too long the administrative state has been sustained by the notion that agencies may impose "rules" that carry the force of law—and that act as the functional equivalent of statutes—so long as the agency can point to

a statute that authorizes (or that could be *reasonably construed* to authorize) the practice of agency lawmaking. At the same time, this Court, along with academic commentators, has nurtured and championed a series of legal fictions that deny the reality of agency lawmaking and thereby give a patina of constitutional legitimacy to this practice. The fictitious character of these three ideas makes them poor excuses for Congress's attempt to divest itself of power that the Constitution vested uniquely in it. We respectfully ask the Court to reconsider—or at least call into question—the most commonly invoked fictions that are used to justify rule by administrative agencies.

The first fictitious idea is that agencies are "executing" the law whenever they regulate pursuant to congressional authorization—even when the underlying statute empowers the agency to enact formal rules that carry the force of a congressionally enacted statute, and even when it gives the agency vast discretion to choose the rules that will be enacted. *See, e.g.*, Eric A. Posner and Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721, 1723 (2002) ("[A]gents acting within the terms of such a statutory grant are exercising executive power, not legislative power."). Not even James Landis, the leading expositor and defender of administrative power during the twentieth century, believed this fiction. Landis wrote that "[i]t is obvious that the resort to the administrative process is not, as some suppose, simply an extension of executive power" and that "[c]onfused observers have sought to liken this development to a pervasive use of executive power." James M. Landis, *The Administrative Process* 15 (1966).

Landis is right. The notion that an agency is merely "executing" the law when it is choosing policies and imposing those policy choices in the form of codified rules is a transparent fiction and is incompatible with the jurisprudence of this Court. Agencies act as lawmakers when issuing rules that bind the public, which is why courts and commentators describe their work product as "legislative rules." *See, e.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) ("We described a substantive rule—or a 'legislative-type rule'—as one 'affecting individual rights and obligations.'" (citation omitted)); *Batterton v. Francis*, 432 U.S. 416, 425 n. 9 (1977) ("Legislative, or substantive, regulations are issued by an agency pursuant to statutory authority. ... Such rules have the force and effect of law." (citation and internal quotation marks omitted)); Kenneth Culp Davis, 2 Administrative Law Treatise § 7:8 at 36 (2d ed. 1979) ("A legislative rule is the product of an exercise of delegated legislative power to make law through rules. ... [V]alid legislative rules have about the same effect as valid statutes; they are binding on courts.").

This Court describes an agency's rulemaking and adjudicatory powers not as "executive" but as "quasi-legislative" and "quasi-judicial." *See, e.g., Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010) (describing agency rulemaking as "legislative or quasi-legislative activities."); *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935). Indeed, this Court would not be able to characterize agency rulemaking as purely "executive" without overruling *Humphrey's Executor* and requiring *all* agency officials with rulemaking powers to be placed under presidential control.

The second fiction is the idea that agency lawmaking is merely "specifying" or "filling in the details" of a statutory standard that cannot be written in advance to account for all contingencies. *See, e.g., United States v. Grimaud*, 220 U.S. 506, 517 (1911) ("[W]hen Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations"). But even where authorizing statutes offer governing standards, the authorized agencies are not merely specifying or filling in details. As is widely understood, such statutes typically leave the most difficult legislative questions to the agencies—indeed, members of Congress notoriously use such statutes precisely to avoid making difficult legislative decisions. See D. Schoenbrod, *Power Without Responsibility*, 9–19, 55–59, 72–94, 102–05, 157–59 (Yale U. Press 1993).

The notion of specification is especially fictitious here because § 20913(d) does not even provide a governing standard for the Attorney General to "specify." The statute anticipates the issues of applying SORNA's registration requirements to pre-SORNA offenders and its implementation in any particular jurisdiction, but then it gives the Attorney General carte blanche to decide what—if anything—should be done about these questions. The Attorney General is not "specifying" or "filling in the details" of anything except his own druthers.

Congress divested these quintessentially political choices to a prosecutorial entity with very different institutional interests. Unsurprisingly, the Attorney General answered both questions in a way that maximized his own

enforcement authority—reaching convictions finalized before SORNA's enactment, whether or not a state chose to require registration. *See United States v. Stock*, 685 F.3d 621, 626 (6th Cir. 2012) (the obligation to register "exists whether or not a state chooses to implement SORNA's requirements and whether or not a state chooses to register sex offenders at all"). But legislative power is vested in the Congress precisely because it is politically accountable. *See I.N.S. v. Chadha*, 462 U.S. 919, 966 (1983) (Powell, J., concurring) ("The only effective constraint on Congress' power is political[.]"). In this way, Congress shirked the toughest aspect of lawmaking while avoiding entirely its primary constitutional limit. These are hardly "details."

The third and final fiction is the idea that an agency cannot be involved in lawmaking if Congress has provided an "intelligible principle" to inform the agency's discretion. Acts of lawmaking and legislation do not depend on whether or not some other entity has supplied an "intelligible principle" that purports to guide the legislative decision. Every act of Congress, for example, is guided and controlled by an "intelligible principle" supplied by the enumerated-powers regime; Congress must always connect its statutes to one or more of those "intelligible principles" that define and limit what Congress may do. But Congress is most assuredly "legislating" when it enacts statutes, even though it does so pursuant to a grant of power that limits and controls Congress with a series of "intelligible principles." The result is no different when an agency issues an edict under a statute that confers powers defined by an "intelligible principle"—such as an

instruction to "regulate in the public interest." Every lawmaking entity holds powers that were authorized or vested in it by *somebody*, and there is almost always some semblance of an "intelligible principle" that defines the boundaries of those powers. But that does not change the legislative character of the resulting edict.

Rather than perpetuate these notorious fictions, this Court should recognize that Congress has asked the Attorney General to exercise legislative power in its stead, and he has complied—all in violation of the Constitution's vesting of legislative powers in Congress. The Court should therefore reject the results of that bargain.

C. Divesting Legislative Power also Evades Bicameralism and Presentment

When this Court permits Congress to divest itself of legislative power, it also weakens accountability to the people by allowing an evasion of bicameralism and presentment. Bicameralism and presentment make lawmaking difficult *by design*. The Federalist No. 62, pp. 319–24 (J. Madison) and No. 63, pp. 325–32 (Liberty Fund ed. 2001). These requirements ensure that laws are made by the two houses of Congress and are subject to the possibility of a veto. Responsibility thus lies in the two elected legislative bodies and in an elected president—all of whom are personally accountable to the people.

But when Congress divests itself of its legislative power, "the people lose control over the laws that govern them .... [T]he public loses the right to have both its elected representatives *and* its elected president take personal responsibility for the law." D. Schoenbrod, *Power Without Responsibility* 99, 105 (Yale U. Press

1993). Instead, only someone appointed by the president takes responsibility—an appointee who is not personally chosen by the public or accountable to them at the next election.

In this very case, Congress was not able to obtain the votes needed to apply SORNA to all prior sex offenders. That provision was in the House bill, but it was in neither the Senate bill nor the final bill that passed both houses. By assigning the decision about retroactive application to the Attorney General, SORNA led to adoption of a "law" that could not and did not clear the bicameral hurdle.

This Court should abandon its nondelegation doctrine and the attendant legal fictions. Having done this, it should recognize that § 20913(d) is unconstitutional because the Constitution bars Congress from divesting itself of legislative power and evading bicameralism and presentment.

II. SECTION 20913(d) FAILS TO SUPPLY AN "INTELLIGIBLE PRINCIPLE," AS REQUIRED BY THE PRECEDENTS OF THIS COURT

This Court has repeatedly affirmed that the Constitution forbids Congress from giving lawmaking powers to executive or agency officials—even as the "nondelegation doctrine" moniker has misdescribed and downplayed the offense to the Constitution.

In *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), this Court observed:

> That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance

> of the system of government ordained by the constitution.

Id. at 692. This Court has further held—repeatedly and in an unbroken line of cases—that statutes that empower the executive to act without supplying *any* standard to guide his discretion, and without at least gesturing toward a congressional policy goal that will inform the executive's use of this discretion, violate Article I's vesting clause by improperly conferring legislative power on executive or agency officials.

A. SORNA Fails the Nondelegation Tests Enunciated in *Schechter Poultry* and *Panama Refining*

In *A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935), the Court unanimously and emphatically rejected a statutory scheme that empowered the President to impose "codes of fair competition" whenever he made formal findings that the industry-proposed codes would not "promote monopolies" and that the organizations proposing such codes were "truly representative" of the affected trade or industry. *Id.* at 522–23; *see also id.* at 534 ("[T]he approval of a code by the President is conditioned on his finding that it 'will tend to effectuate the policy of this title.'"). The Court quoted Article I's vesting clause and declared that the vesting clause forbids Congress to "abdicate or to transfer to others the essential legislative functions with which it is thus vested." *Id.* at 529. And it pronounced the statute unconstitutional because it "supplies no standards" for guiding the President's discretion. *Id.* at 541. In the words of the Court:

> Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry.

Id. at 537–38. Although other aspects of the *Schechter* opinion—such as its analysis of the commerce power—were later abandoned, this Court has *never* repudiated or undermined *Schechter*'s holding or analysis on the divestment of legislative power, and *Schechter*'s holding on this point remains good law. *See* Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 332 (1999) (noting that *Schechter*'s nondelegation holding "has not been overruled even implicitly").

Section 20913(d) presents an even graver offense to Article I's vesting clause because the statute does not require the Attorney General to make *any* findings before deciding whether and to what extent the statutory registration requirements should apply to pre-SORNA convicts. Not only does this statute "suppl[y] no standards" to guide the Attorney General's discretion, it requires no findings either, making this statute even worse than the statutory scheme that this Court unanimously disapproved in *Schechter*. It essentially tells the Attorney General to do whatever he wants when it comes to imposing statutory registration requirements on pre-SORNA offenders. It even licenses him to vary its implementation by particular jurisdictions, as if laws can vary in their application as dictated by a given public official for his own reasons. A statute of this sort cannot logically co-exist with the holding of *Schechter*—nor can it co-exist with a

constitution that "vests" legislative power in Congress rather than in the executive or its agencies.

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), reaffirmed that statutes empowering the executive must provide some semblance of criteria or factual findings to guide the executive's discretion—otherwise the statute becomes a forbidden transfer of lawmaking power. *Panama Refining* disapproved a statute that authorized the President to prohibit the transportation of petroleum goods produced in excess of state quotas, but that failed to provide any standard or guideline to the President regarding whether or to what extent he should use this power. In the Court's words, the statute "gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit." *Id.* at 415.

So too here. Section 20913(d) has nothing at all to say as to whether the Attorney General should require pre-SORNA convicts to register, or the extent to which he should do so. It allows the Attorney General unfettered discretion in choosing how—or even whether—to extend the statute's registration requirements to this class of sex offenders, without even the pretense of an "intelligible principle" to guide him. Like the statute in *Panama Refining*, it "establishes no criterion to govern the [executive's] course," and it "does not require any finding . . . as a condition of his action." *Id.* at 415. No standard or policy is declared in the statute, and no findings are required to be made. If a statute of this sort can pass constitutional muster, it is hard to imagine a statute that would violate

the nondelegation doctrine or (in the Constitution's words) the vesting clause of Article I.

Indeed, if this statute suffices, it is hard to see why a statute that entrusted the Attorney General to decide whether or not *all* sex offenders—past and future—have to register would be unconstitutional. That is, if unfettered discretion is permissible for half the law, why by the same logic would it not be permissible for the other half of the law?

The only way that the Court could sustain this statute is to throw up its hands and give up on policing the separation of powers—an approach that would effectively carve out a separation-of-powers exception to the rule of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *See, e.g.*, Jesse H. Choper, *Judicial Review and the National Political Process* (1980). What is not possible is to do what the Solicitor General is proposing: Retain the nondelegation doctrine and the "intelligible principle" requirement—as well as the holdings in *Schechter* and *Panama Refining*—but then declare that this statute falls on the proper side of the boundary that separates laws that confer guided discretion on the executive from those that confer unguided discretion. This statute does not even *pretend* to supply an "intelligible principle"; it expressly leaves the decision to the Attorney General and gives him unfettered discretion in applying SORNA's requirements to pre-SORNA convicts.

B. The Court Should Reinvigorate the "Intelligible Principle" Requirement If It Will Not Reject It as a Legal Fiction

For the reasons explained *supra* at pp. 14-15, having an "intelligible principle" does not avoid administrative lawmaking. Hence, this Court should repudiate the "intelligible principle" requirement as a legal fiction. Short of that, however, we respectfully urge the Court to at least substantially strengthen what that requirement entails. The rulings of this Court have so watered down the "intelligible principle" standard as to render it neither intelligible nor principled. It has been held to be enough for a statute to tell an agency to regulate in the "public interest," *i.e.*, whatever the agency regards to be the "public interest." *See, e.g., National Broadcasting Co. v. United States*, 319 U.S. 190, 225–26 (1943) (Federal Communications Commission's power to regulate airwaves).

We have already shown that § 20913(d) offers *no* principle, let alone an "intelligible" one, to guide the Attorney General's discretion—and that is enough to condemn the statute under existing doctrine. But we urge the Court to go further and to put some teeth in the "intelligible principle" requirement. A statute that empowers an agency to go forth and "regulate in the public interest" is a legislative abdication that confers lawmaking powers on agency officials and allows Congress to escape responsibility and accountability for federal policy decisions. If this Court is prepared to hold that § 20913(d) violates Article I's vesting clause by improperly transferring lawmaking powers to the Attorney General, does it really want to imply that Congress can fix the problem simply by adding a

subjective and indeterminate "public interest" requirement to the statute?

The Court's prior decisions have misled Congress into believing that the most open-ended "intelligible principle" will pass muster, and where the Court's own actions have left such a profoundly dangerous misimpression about the law—one that radically diminishes the liberty of Americans—the Court has a responsibility to correct its error and rectify the misimpression now that the chance to do so has arisen.

III. Section 20913(d) Violates the Constitution by Empowering the Attorney General to Act as Both Lawmaker and Law Enforcer

Another constitutional problem with § 20913(d) is both simple and obvious: Congress only passed half a law. The result allows the Attorney General, a member of the *executive* branch, to act as both lawmaker and law enforcer. The Attorney General—and he alone—gets to decide whether and to what extent hundreds of thousands of pre-SORNA convicts must register. And he can change his mind at any time and as many times as he chooses. At the same time, the Department of Justice under his supervision is empowered to decide whether to prosecute those who violate his unilateral edicts.

When heads of administrative agencies enjoy both rulemaking power and oversight over agency enforcement under their authorizing statutes, this combination is defended on the theory that the Constitution's separation of powers requires only a separation of functions. From this perspective, it is said that the Administrative Procedure Act sufficiently segregates the different functions of

government within agencies as to leave few serious concerns about the combination of lawmaking and prosecution in a single agency. But unlike the authorizing statutes of administrative agencies, which make at least some effort to allocate different governmental functions to different persons, SORNA empowers a single person—the Attorney General—personally to make the rules and enforce them. SORNA thus does not admit a separation of functions. On the contrary, it combines them in violation of the theories that are said to justify administrative power.

Indeed, its combination of powers in a single person also violates the Constitution. By vesting legislative and judicial powers in different branches of government, the Constitution bars the combination of these powers in one agency, let alone one person. Nor should this be a surprise, for the combination of such powers in one body (institutional or personal) has long been considered very dangerous. *See* Montesquieu, *The Spirit of the Laws* (1748) ("When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."); P. Hamburger, *Is Administrative Law Unlawful?* 261 ("The combination of powers in administrative agencies . . . gives them a power of extortion." For example, an agency, "by threatening executive or judicial action" can "pursu[e] one power by threatening the use of another.").

But the strongest arguments against SORNA's combination of lawmaking and prosecutorial powers in the

Attorney General do not rest merely on the administrative theory of separated functions, nor even on general ideas about the Constitution's separation of powers. Instead, the really telling objections are more focused.

A. SORNA Is Incompatible with the Attorney General's Duties

The Attorney General is not just another head of a government agency. He is the principal legal officer of the federal government. He is, indeed, its chief prosecutor who, more than any other officer, has the task of carrying out the President's constitutional duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. And he is "the principal Officer" of one of "the executive Departments," of whom the President "may require the Opinion, in writing . . . upon any Subject relating to the Duties of their respective Offices." U.S. Const. art. II, § 2. In overseeing that the laws be faithfully executed, and in giving the President formal opinions on the law, the Attorney General exercises an element of executive power, which the Constitution carefully places in a different department than the one in which it locates legislative powers.

The Attorney General, moreover, like other government lawyers, has a duty that goes beyond the mundane duty of a private lawyer to zealously represent his client. In addition to his duty of representation, a government lawyer has a duty to adhere to the law. P. Hamburger, *Law and Judicial Duty* 111, 320–21, 492 (Harvard U. Press 2008). Although not specified in the Constitution, this duty is implicit in the Constitution's assumption that the President will appoint officers such as the Attorney General to

effectuate the President's duty to "take Care that the Laws be faithfully executed." The Attorney General, acting under the President, thus has a constitutional duty, derived from the President's, to take care that the laws be faithfully executed.

The Attorney General's duty is different from that of a judge because government lawyers have a duty, not of judgment in accord with the law, but of advising, prosecuting, and arguing in accord with the law. Put another way, their duty is one of providing advice and representation rather than of independent judgment; but whereas private lawyers are free to give advice, bring actions, and make arguments that they know to deviate from the law, government lawyers must try to remain within its scope.

And it is in tension with this duty for the Attorney General to personally enact law (here in administrative rules) and then oversee the prosecution of offenders under these laws. Of course, government lawyers do not need to be as completely without predispositions as the judges in their decisions, for government lawyers have a client—the government and ultimately the people of the United States. And in this context, they advise the executive branch on legislation enacted by Congress. But the Constitution establishes the executive branch apart from the legislative branch, and it thus takes for granted that lawyers within the executive will not have any predisposition arising from their personal enactment of law. In other words, it is assumed in the Constitution that government lawyers will try to remain within the law when prosecuting and arguing for the government, without the partiality

that comes from having personally enacted the underlying rule.

By enacting binding rules under SORNA, the Attorney General will inevitably be inclined in favor of his own enactments, in favor of their rigorous enforcement, and in favor of their constitutionality. He therefore cannot be expected to "take Care that the Laws be faithfully executed" under SORNA to the same extent as when he does not participate in lawmaking. He cannot personally make a law without jeopardizing his duty (derivative of the president's) to take care that the laws be faithfully executed.

SORNA creates, in other words, an unconstitutional conflict of interest. Under the Constitution, the Attorney General has a duty to the people to take care that the laws are faithfully executed. And by locating his office outside of Congress, the Constitution enables him to do his duty without the conflict of interest that would be inevitable if he also enacted the laws. In contrast, when he makes law, he acquires an interest in that law that conflicts with his ability to do his duty to the people—a conflict that the Constitution carefully avoided by separating his office from the legislature.

Put more generally, the combination of powers in the Attorney General at work here reveals how administrative power corrupts executive power. By transferring lawmaking power to the nation's supervising prosecutor, SORNA not only divests Congress of the power that the Constitution vested in it, but it also gives the Attorney General a legislative role that is incompatible with the duties that the Constitution vests in the executive—in particular, the duty to take care that the laws be faithfully

executed. If there is to be a legitimate role for an administrative state, it cannot undermine the constitutional duties of the executive.

B. SORNA Revives the Constitutionally Forbidden Suspending and Dispensing Powers

SORNA empowers the Attorney General to exclude persons from the statute's ambit and thereby confers upon him the long-forbidden suspending and dispensing powers. In allowing him to make the statute applicable to prior offenders and then change his mind, § 20913(d) permits him to suspend the statute. And in authorizing him initially or later to pick and choose which sorts of prior offenders are not covered and even to relax "its implementation in a particular jurisdiction," § 20913(d) allows him to dispense with the statute.

This administrative revival of the suspending and dispensing powers violates Article I's vesting of legislative powers in Congress. Early English kings claimed an absolute power to suspend statutes for all persons and to dispense with statutes for particular persons, and these powers came to be viewed as incompatible with legislative power. P. Hamburger, *Is Administrative Law Unlawful?* 69 (quoting, for example, Sir William Williams: "Is there anything more pernicious than the dispensing power? There is an end of all the legislative power, gone and lost.") The exercise of such powers did much to provoke the English Revolution of 1688, and in response, the English Declaration of Rights in 1689 barred any exercise of the dispensing or suspending powers unless authorized by Parliament. ("That the pretended power of suspending of laws or the execution of laws by regal authority without

consent of Parliament is illegal" and that "no dispensation by non obstante of or to any statute or any part thereof shall be allowed but that the same shall be held void and of no effect except a dispensation be allowed of in such statute.").

Early American state constitutions vested legislative power in their legislatures and thereby generally defeated executive dispensations and suspensions of statutes. The exception was that about half the early state constitutions followed the English Declaration of Rights in leaving room for executive suspensions of statutes with legislative authorization. (The Maryland Constitution, for example, provided that "no power of suspending Laws, or the execution of Laws, unless by, or derived from the Legislature, ought to be exercised, or allowed." Md. Decl. of Rights, Art. 9.) The U.S. Constitution is even more sparing; it leaves space only for a suspension of habeas corpus, only in extreme circumstances, and only when Congress itself suspends the writ. U.S. Const. art. I, § 9. The U.S. Constitution thus bars any executive dispensing or suspending of statutes, or of their execution. It follows that the Attorney General cannot enjoy discretion to choose the application and implementation of SORNA.

The combination of executive and legislative powers in the Attorney General violates the administrative theory of separated functions and the Constitution's separation of powers. But even if one could get past those objections, it is also incompatible with the Attorney General's executive duties—notably to take care the laws are faithfully enforced—and it gives him suspending and dispensing powers that Article I forbids.

IV. Constitutional Concerns Are Especially Grave When Congress Divests Itself of Criminal Lawmaking Powers

Perhaps the most disturbing feature of this case is that § 20913(d) gives the Attorney General unilateral authority to decide whether individuals will be subject to the requirements of a *criminal* statute. The consequences of violating SORNA are severe: a fine and imprisonment up to 10 years. *See* 18 U.S.C. § 2250(a). Yet the statute *refuses to say* whether the hundreds of thousands of sex offenders convicted before SORNA are subject to the law's requirements and its criminal penalties. Instead, the statute empowers the Attorney General to decide—in his complete and unfettered discretion—whether the law even applies to this vast category of individuals.

No less troubling is the fact that the statute allows the Attorney General to change his mind or change the policies of his predecessor on these matters at any moment whenever he sees fit to do so. What is today a federal crime might not be a federal crime tomorrow, depending on what today's Attorney General happens to be thinking or deciding. And what is not a federal crime today might become a federal crime tomorrow—depending once again on a unilateral edict from the Attorney General.

It is intolerable for the law-making and law-enforcing powers to be combined in the person of a single individual officeholder when criminal penalties are at stake. The power to impose imprisonment and criminal sanctions is among the most awesome and dangerous powers that a government wields over its citizens, and it is a power that has been gravely abused by governments throughout

world history. Our Constitution is almost obsessed with controlling these powers to ensure that our nation never falls prey to the abuses and atrocities that have plagued the administration of criminal justice in other nations, as shown by the prohibitions on Bills of Attainder and Ex Post Facto laws, the jury guarantee in Article III, the definition of treason, the two-witness requirement, and the remarkable set of protections that appears in the Bill of Rights.

But the most important protection of all comes in the vesting clauses of Articles I, II, and III. No citizen can be imprisoned for a federal crime unless Congress—a multimember body—enacts a statute making the conduct illegal, the executive decides to bring charges, and the defendant is convicted in court before an independent judge, with a right to a jury. Popular sovereignty bookends this process: the criminal prohibition must be enacted by a representative legislature, and the defendant has the right to have the criminal conviction come from a jury chosen from the citizenry. *See Blakely v. Washington*, 542 U.S. 296, 306 (2004). And the essential involvement that is needed from all three branches prevents the corruption of a single branch—or even the corruption of two of the three branches—from leading to unjust imprisonment.

But SORNA short-circuits this process by allowing the Attorney General rather than Congress to decide whether pre-SORNA offenders should be required to register and be subject to criminal penalties for failing to do so. Rather than resolving this issue in the statute, § 20913(d) responds with a shrug and a punt that purports to authorize the law-enforcing authority to be the

lawmaker as well—all in a criminal matter with the risk of imprisonment that entails.

SORNA administratively combines lawmaking and prosecution. The criminal law itself is thereby corrupted.

James Madison spoke eloquently of the constitutional offense that arises when statutes empower those who enforce the criminal laws to simultaneously define the relevant criminal prohibitions:

> However difficult it may be to mark, in every case, with clearness and certainty, the line which divides legislative power from the other departments of power, all will agree that the powers referred to these departments may be so general and undefined, as to be of a legislative, not of an executive or judicial nature, and may for that reason be unconstitutional. Details, to a certain degree, are essential to the nature and character of a law; and on criminal subjects, it is proper that details should leave as little as possible to the discretion of those who are to apply and execute the law. *If nothing more were required, in exercising a legislative trust, than a general conveyance of authority—without laying down any precise rules by which the authority conveyed should be carried into effect—it would follow that the whole power of legislation might be transferred by the legislature from itself, and proclamations might become substitutes for law.* A delegation of power in this latitude would not be denied to be a union of the different powers.

James Madison, 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 559–60 (Jonathan Elliot ed., 2d ed., 1836) (emphasis added). The Court cannot remain faithful to the government established by Madison and the other Framers if it is willing to allow the Attorney General's "proclamation" to serve as the basis for a criminal prosecution. Congress must codify the Attorney General's rule through bicameralism and presentment before Gundy (or any other pre-act offender) may be prosecuted for "violating" SORNA.

V. The Court May Remedy the Constitutional Violations by Just Invalidating the Attorney General's Rule

When a statute such as § 20913(d) improperly confers lawmaking powers on executive or agency officials, the conventional remedy is to declare the underlying statute unconstitutional. *See Schechter Poultry*, 295 U.S. at 542; *Panama Refining*, 293 U.S. at 430. But this is not the only possible remedy, for this Court can also focus on the executive or agency lawmaking done under the statute and hold that executive or agency action unconstitutional and void.

And while we of course believe that this Court *should* pronounce § 20913(d) unconstitutional, we note that this Court could also or instead take the more modest step of invalidating the Attorney General's rule as an unconstitutional usurpation of legislative power. The Attorney General's rulemaking was the unconstitutional government action that most directly and immediately penalized Gundy, and the Court should therefore at the very least

hold the Attorney General's rule unconstitutional and void.

This Court has often said that an Act of Congress is entitled to a strong presumption of constitutionality, and that rulings pronouncing a federal statute unconstitutional are not to be made lightly. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("[W]e invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."); *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring) (describing the decision to declare an Act of Congress unconstitutional as "the gravest and most delicate duty that this Court is called on to perform"). Here, this Court can take the less dramatic step of disapproving the Attorney General's rule. Lawmaking by executive officials is improper regardless of whether an Act of Congress purports to authorize it—and this Court can simply proclaim that the Attorney General's rule has no legal effect because it was not enacted according to the "finely wrought" constitutional procedure for creating laws. *See Clinton v. City of New York*, 524 U.S. 417, 440 (1998).

Either way, the Court must recognize the Attorney General's complicity in this unconstitutional lawmaking. Executive and agency officials are all too often pleased to receive legislative powers from Congress, without pausing to ask whether the Constitution would allow the allotment of powers described in the underlying statutes. But a conscientious Attorney General does not passively accept Congress's divestitures of legislative power. Instead, he conducts his own investigation into the constitutionality of this arrangement. And if he concludes that Congress

has improperly divested itself of legislative powers, then he must insist that Congress codify his proposed rulemaking in a statute before taking any steps to issue and enforce his rule.

Congress of course deserves blame for its eagerness to pass the buck to executive and agency officials. But it should not be forgotten that the Attorney General's unconstitutional rulemaking under SORNA was the more direct and immediate cause of harm to Gundy. So let us not absolve the *recipients* of these divested congressional powers of blame by focusing solely on the congressional malfeasance that undergirds these unconstitutional lawmaking regimes.

If the Attorney General cannot be counted upon to decline taking the unconstitutional bait, there is little hope that other cabinet officers or agency officials—many of whom are not lawyers—will reject invitations to legislate that Congress never should have extended. Perhaps by striking down the Attorney General's unconstitutional rule, this Court can drive home the point that executive officials have a duty to decide for themselves whether they can constitutionally perform statutory directions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 17-6086

In The
Supreme Court of the United States

HERMAN AVERY GUNDY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF REVERSAL

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QUESTIONS PRESENTED

1) Whether the Intelligible Principle test is compatible with the original meaning and purpose of the Constitution's Separation of Powers design.

2) Whether the approach this Court has applied in Void for Vagueness cases would more faithfully enforce the Non-Delegation Doctrine.

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Auer v. Robbins,
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Building Industry Association of the Bay Area v. U.S. Dep't of Commerce,
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Carter v. Welles-Bowen Realty, Inc.,
736 F.3d 722 (6th Cir. 2013) 15

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 14

Citizens to Preserve Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971) 16

City of Arlington, v. F.C.C.,
569 U.S. 290 (2013) 6-7

City of Chicago v. Morales,
527 U.S. 41 (1999) 27-28

City of Chicago v. Morales,
687 N.E.2d 53 (Ill. 1997) 28

Cox v. State of Louisiana,
379 U.S. 536 (1965) 24

Decker v. Nw. Envtl. Def. Ctr.,
568 U.S. 597 (2013) 1

Dep't of Transp. v. Association of American Railroads, 135 S. Ct. 1225 (2015) 7

Executive Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165 (2014) 13

Giaccio v. State of Pennsylvania, 382 U.S. 399 (1966) 24-25, 29-30

Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 136 S. Ct. 2442 (2016) 1

Grayned v. City of Rockford, 408 U.S. 104 (1972) 19

Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016) 14

Heckler v. Chaney, 470 U.S. 821 (1985) 16

Herndon v. Lowry, 301 U.S. 242 (1937) 23-24

Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968) 25-26

J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928) 3, 5, 23

Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959) 26

Kolender v. Lawson, 461 U.S. 352 (1983) 21, 27-28

Lucia v. SEC, 138 S. Ct. 736, *cert. granted* (2018) 1

Marbury v. Madison,
5 U.S. 137 (1803) 13

Markle Interests, L.L.C., v. U.S. Fish & Wildlife Serv., 827 F.3d 462 (5th Cir. 2016), cert. granted, Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 138 S. Ct. 924 (2018) 17

Marshall Field & Co. v. Clark,
143 U.S. 649 (1892) 9

Mistretta v. United States,
488 U.S. 361 (1989) 18

Moose Jooce, et al., v. FDA,
No. 1:18-cv-00203-CRC (D.D.C. Jan 30, 2018)..... 11

Morrison v. Olson,
487 U.S. 654 (1988) 2

Nat'l Ass'n of Mfrs. v. Dep't of Def.,
138 S. Ct. 617 (2018) 1

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012) 31

National Cable & Telecommunications Association v. Brand X Internet Services,
545 U.S. 967 (2005) 14-15

Panama Refining Co. v. Ryan,
293 U.S. 388 (1935) 3

Papachristou v. City of Jacksonville,
405 U.S. 156 (1972) 26

Perez v. Mortgage Bankers Ass'n,
135 S. Ct. 1199 (2015) 7

Rapanos v. United States,
547 U.S. 715 (2006) 2

Sackett v. EPA,
566 U.S. 120 (2012) 1, 6

Sessions v. Dimaya,
138 S. Ct. 1204 (2018) 20-21, 25

Shuttlesworth v. City of Birmingham,
382 U.S. 87 (1965) 24

Smith v. Goguen,
415 U.S. 566 (1974) 26-27, 29

U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.,
136 S. Ct. 1807 (2016) 1, 6

United States v. L. Cohen Grocery Co.,
255 U.S. 81 (1921) 20, 23

United States v. Reese,
92 U.S. 214 (1875) 20

United States v. Wiltberger,
5 Wheat. 76, 95 5 L. Ed. 37 (1820) 15

Wayman v. Southard,
23 U.S. (10 Wheat.) 1 (1825) 9

Whitman v. American Trucking Ass'ns., Inc.,
531 U.S. 457 (2001) 3-4, 18

CONSTITUTIONS

Mass. Const. pt. 1, art. XXX. 2

U.S. Const. art. I, § 1 7-8

U.S. Const. art. III, § 1 13

STATUTES

29 U.S.C. § 652(8) 6

34 U.S.C. § 20913 3

42 U.S.C. § 16913(d) 3

47 U.S.C. § 151 5
§ 201(b) 5

RULES

S. Ct. Rule 37.3(a) 1

S. Ct. Rule 37.6 1

OTHER AUTHORITIES

Brown, Rebecca L.,
Accountability, Liberty, and the Constitution,
98 Colum. L. Rev. 531 (1998) 9

Caplan, Bryan,
The Myth of the Rational Voter:
Why Democracies Choose Bad Policies
(Princeton University Press 2007) 11

Chapman, Nathan S. & McConnell, Michael W.,
Due Process as Separation of Powers,
121 Yale L.J. 1672 (2012) 21

Clarke, Conor,
The Uneasy Case Against
Auer *and* Seminole Rock,
33 Yale L. & Pol'y Rev. 175 (2014) 14

Dahl, Robert A.,
Myth of the Presidential Mandate,
105 Pol. Sci. Q. 355 (1990) 11

Dal Bo, Ernesto,
Regulatory Capture: An Overview,
Oxford Review of Economic Policy,
vol. 22 no. 2 (2006) 12

Declaration of Independence ¶ 2 (U.S. 1776) 9

Forde-Mazrui, Kim,
Ruling Out the Rule of Law,
60 Vand. L. Rev. 1497 (2007)..... 21

Gattuso, James,
Testimony before The Subcommittee on Regulatory Reform, Commercial and Antitrust Law in the Committee on the Judiciary,
U.S. House of Representatives (Mar. 5, 2013) 10

Hamilton, Alexander, or Madison, James,
The Federalist No. 51 12

Hamilton, Alexander,
The Federalist No. 21 10

Hamilton, Alexander,
The Federalist No. 78
(J. Cooke ed. 1961) 9

Hessick, Carissa Byrne,
Vagueness Principles,
48 Ariz. St. L.J. 1137 (2016) 21

Huefner, Steven F.,
The Supreme Court's Avoidance of the Nondelegation Doctrine in Clinton v. City of New York*: More Than "A Dime's Worth of Difference,"*
49 Cath. U. L. Rev. 337 (2000)..... 18-19

Katyal, Neal K.,
Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within,
115 Yale L.J. 2314 (2006) 11

Lawson, Gary,
Delegation and Original Meaning,
88 Va. L. Rev. 327 (2002) 8

Lemos, Margaret H.,
The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine,
81 S. Cal. L. Rev. 405 (2008) 8-9

Madison, James,
The Federalist No. 39 9-10

Manin, Bernard,
The Principles of Representative Government
(Cambridge University Press 1997) 9

Merrill, Thomas W.,
Delegation and Judicial Review,
33 Harv. J.L. & Pub. Pol'y 73 (2010) 16

Note, *Justifying the* Chevron *Doctrine: Insights from the Rule of Lenity*,
123 Harv. L. Rev. 2043 (2010) 14

Postell, Joseph,
From Administrative State to Constitutional Government (2012)
http://thf_media.s3.amazonaws.com/2012/pdf/sr116.pdf 14

Schoenbrod, David,
Power Without Responsibility: How Congress Abuses the People Through Delegation
(Yale University Press 1995) 10, 22

Schuck, Peter H.,
Delegation and Democracy: Comments on David Schoenbrod,
20 Cardozo L. Rev. 775 (1999) 18

Sunstein, Cass R.,
After the Rights Revolution: Reconceiving the Regulatory State,
(Harvard University Press 1990) 13

Sunstein, Cass R.,
Is OSHA Unconstitutional?,
94 Va. L. Rev. 1407 (2008) 6

Turley, Jonathan,
The rise of the fourth branch of government,
Washington Post (May 24, 2013) 11-12

Walker, Christopher J.,
Avoiding Normative Canons in the Review of Administrative Interpretations of the Law: A Brand X Doctrine of Constitutional Avoidance,
64 Admin. L. Rev. 139 (2012) 15

Walters, Daniel E.,
Litigation-Fostered Bureaucratic Autonomy: Administrative Law Against Political Control,
28 J.L. & Pol. 129 (2013) 11

INTEREST OF AMICUS CURIAE[1]

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation and advocacy in matters affecting the public interest. PLF helps mainstream Americans defend constitutionally mandated Separation of Powers, limited government, private property rights, individual freedom, and free enterprise. PLF is the most experienced public interest legal organization defending the Separation of Powers in the arena of administrative law. In the last 12 years, this Court has ruled in favor of four parties PLF has directly represented (two decisions were unanimous) and participated as amicus in several other cases before this Court involving Separation of Powers issues. *See, e.g., Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018); *Lucia v. SEC*, 138 S. Ct. 736, *cert. granted* (2018) (administrative law judges and the Appointments Clause); *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (*Auer* deference to agency guidance letter); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013) (Auer

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

deference to Clean Water Act regulations); *Rapanos v. United States*, 547 U.S. 715 (2006) (agency regulations defining "waters of the United States").

PLF's adherence to constitutional principle and broad litigation experience offer the Court an important perspective that will assist in reviewing this case. Because the erroneous decision below violates core Separation of Powers principles, PLF supports reversal.

INTRODUCTION AND SUMMARY OF ARGUMENT

"It is the proud boast of our democracy that we have 'a government of laws, and not of men.'" *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (quoting Part the First, Article XXX, of the Massachusetts Constitution of 1780). For this to be true, lawmaking and enforcement actions must remain in different hands. The text, history, and design of our Constitution make clear that this most important separation of functions and powers is part of our fundamental law.

This Court recognizes, at least in principle, that Congress may not re-delegate its legislative power.[2] "Article I, § 1, of the Constitution vests '[a]ll legislative

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[2] Amicus uses the term "re-delegate" because *the people* made the original delegation of lawmaking power to Congress, and Congress is attempting a subsequent re-delegation. Other terms, including "sub-delegate," may capture a similar concept, but whatever terms are used, amicus does not think the Non-Delegation principle or its violation is distinguishable depending on the person or entity to which Congress attempts to re-delegate its lawmaking power.

Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers . . . ." *Whitman v. American Trucking Ass'ns., Inc.*, 531 U.S. 457, 472 (2001). For that reason, "the constitutional question" in this and every Non-Delegation case "is whether the statute has delegated legislative power to the agency." *Id.* If it has, the statute granting such legislative power must be struck down.

Unfortunately, this Court has not enforced this principle in the last 83 years. No statute has been invalidated under the Non-Delegation Doctrine since 1935. *See Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). That failure is largely due to the overly deferential test this Court currently applies in Non-Delegation cases: the "Intelligible Principle" test, especially the lax version of the test applied during the last 80 years. This test asks whether a statute provides a re-delegatee of rulemaking power some "intelligible principle" to guide his rulemaking decisions. *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

And yet the statute at issue in this case, the Sex Offender Notification and Registration Act (SORNA), violates even this highly permissive approach, since it provides *no* guidance to the Attorney General whatsoever in making his or her decision. Instead, Congress re-delegated to the Attorney General the sole discretion and "authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act . . . ." 34 U.S.C. § 20913(d) (formerly codified at 42 U.S.C. § 16913(d)). To be clear, SORNA would violate

any test this Court has yet or might in the future devise to determine if Congress crossed the line in re-delegating its lawmaking power, as Petitioner and many other amici have forcefully demonstrated. But this Court should go further than merely reversing the decision below on the narrowest of grounds. If SORNA is the only statute struck down as an excessive delegation in over 80 years, Congress will have no sense of the constitutional line it must tow. For this reason, amicus urges the Court to reexamine the Intelligible Principle test itself.

In the past, this Court has expressed hesitation to enforce a more robust Non-Delegation Doctrine, for fear that drawing such a line between permissible and impermissible executive discretion may be too difficult. *See, e.g., American Trucking*, 531 U.S. at 474-75. But this hesitation is unwarranted. This Court has shown that it is fully capable of drawing such a line successfully because it already *has* drawn precisely this line in a closely related doctrine: the Void for Vagueness Doctrine. The Court has examined numerous statutes that granted so much discretion to police, prosecutors, judges, and juries that these enforcers, rather than Congress, were effectively re-delegated the power to create law according to their own preferences. This Court has, rightly, struck down these laws.

The responsibility for policing the constitutional Separation of Powers rests with the Judicial Branch and, ultimately, this Court. *See American Trucking*, 531 U.S. at 473. Amicus asks nothing more than that this Court apply the same scrutiny when the beneficiary of broad discretion is an Executive Branch rulemaker, as it does in other analogous contexts.

ARGUMENT

I

THE INTELLIGIBLE PRINCIPLE STANDARD DOES NOT EFFECTIVELY PREVENT UNCONSTITUTIONAL RE-DELEGATION OF LEGISLATIVE POWER TO EXECUTIVE AGENCIES

This Court has treated the Intelligible Principle test as the *sine qua non* of Non-Delegation Doctrine analysis for 90 years. This test debuted in *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409 ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."). In that case, a reasonable argument could have been made that the statute *did* in fact leave only interpretation and enforcement to the executive since it called for a reasonably rigorous factual determination of economic costs based on various specified factors. *See id.* at 404-05. The Court's imprecise language and other dicta did more to mislead future judges than its holding.

And in the decades since 1935, this Court has required less and less specificity in the "intelligible principles" given to the executive. As a result, Congress has been encouraged to delegate huge swaths of its legislative power over different subject matters, with the merest instruction that the relevant agency regulate "in the public interest." *See, e.g.*, The Communications Act of 1934, 47 U.S.C. §§ 151, 201(b) (delegating power to the FCC to "prescribe such rules

and regulations as may be necessary in the public interest to carry out the provisions" of the Act, which broadly grants lawmaking power over "communications services"). OSHA's organic statute grants it power to issue workplace standards that are "reasonably necessary *or appropriate* to provide safe or healthful employment and places of employment." Occupational Health and Safety Act, 29 U.S.C. § 652(8) (1998). *See also* Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 Va. L. Rev. 1407 (2008) (questioning whether OSHA statute even satisfies the intelligible principle standard).

Even this Court has frequently observed the inherent ambiguity in the reach of the Clean Water Act's term "navigable waters." *See, e.g., Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring) ("The reach of the Clean Water Act is notoriously unclear."); *accord U.S. Army Corps of Engineers*, 136 S. Ct. at 1816 (Kennedy, J., joined by Alito, Thomas, J., concurring) ("[T]he reach and systemic consequences of the Clean Water Act remain a cause for concern."). Still worse, the Executive Branch maintains the position that EPA can bring administrative or judicial enforcement actions (which can be civil or criminal) wherever it considers an illegal discharge to navigable waters to have occurred, even where the Army Corps takes the view that navigable waters were not involved. *Id.* at 1817 (Kennedy, J., joined by Alito, Thomas, J., concurring).

Whether the Court's laxity since 1937 aided the growth of the regulatory state or not, the power and scope of regulatory agencies today make further broad delegations of lawmaking power especially concerning. *See City of Arlington, v. F.C.C.*, 569 U.S.

290, 315 (2013) (Roberts, C.J., dissenting) (noting "the danger posed by the growing power of the administrative state cannot be dismissed"). For this and related reasons, this Court should hold that the Intelligible Principle standard, at least as it has been interpreted in recent decades, does not effectively prevent the unconstitutional re-delegation of legislative power that the Non-Delegation Doctrine explicitly prohibits.

A. The Constitution's Text and Original Meaning Bar the Re-Delegation of Legislative Power

Despite modern debates over the degree to which Congress can or should delegate rulemaking authority, there can be no doubt that the Constitution requires *some* meaningful limitation on this practice. "To the Framers, the Separation of Powers and checks and balances were more than just theories. They were practical and real protections for individual liberty in the new Constitution." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1216 (2015) (Thomas, J., concurring).

In the opening lines of the Constitution, the American people vested *all* legislative power in the United States Congress. *See* U.S. Const. art. I, § 1. The people granted the legislative power to Congress exclusively, just as the people granted coordinate powers exclusively to the Executive and Judicial Branches. *See Dep't of Transp. v. Association of American Railroads*, 135 S. Ct. 1225, 1241 (2015) (Thomas, J., concurring). "When the Government is called upon to perform a function that requires an

exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it." *Id.*

Unlike the grants of executive and judicial power, which may include powers inherent in a chief executive or court, Congress's legislative power is expressly limited to those powers granted in the Constitution. *See* U.S. Const. art. 1, § 1 ("All legislative powers *herein granted* . . . .") (emphasis added). *See also* Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 337 (2002) ("Congress can exercise only those legislative powers referenced elsewhere in the Constitution rather than any imaginable powers that bear the label 'legislative.'"). Further, the subjects upon which Congress is empowered to legislate are enumerated in Article I. The theory of enumeration itself also strongly supports a bar on re-delegation of lawmaking power, for there is no re-delegation power provided, and detailed checks on lawmaking power in the original grant by the people to Congress would be worthless if a re-delegation power was implied. *See* Lawson, *supra*, at n.32.

Early practice affirms this principle. Some have suggested that instances of special rulemaking in the early days of the Republic provide a precedent for modern rulemaking-as-policymaking. But these early cases are not comparable to the rules set down by the modern administrative state. The first Congress did cede some special rulemaking authority to the executive and judiciary pursuant to its enumerated powers relating to the military, the Indian Commerce power, and federal court procedures. *See* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. Cal. L.

Rev. 405, 411-12 (2008). But no one doubted that Congress cannot delegate "powers which are strictly and *exclusively* legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825) (emphasis added); *see also Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."). At its most concrete, the power to legislate is the power to prescribe "the rules by which the duties and rights of every citizen are to be regulated." *The Federalist No. 78* (Alexander Hamilton) (J. Cooke ed. 1961).

B. The Intelligible Principle Standard Frustrates Democratic Accountability

The Declaration of Independence labels as self-evident that the legitimacy of government action is directly predicated on the consent of the governed. The Declaration of Independence ¶ 2 (U.S. 1776). Consent in a representative form of government is secured through participation in the democratic process. *See* Bernard Manin, *The Principles of Representative Government* 175, 178 (Cambridge University Press 1997) ("The central institution of representative government is election . . . ."). It is through their elected representatives that citizens are made "present" in their government. *Id.* And it is through the operation of democratic oversight that we can justify describing any form of government as "by the people." *See* Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 Colum. L. Rev. 531, 532-33 (1998). *See also The Federalist No. 39* (James

Madison) (defining a republic as "a government which derives all its powers directly or indirectly from the great body of the people"). "The genius of republican liberty seems to demand on one side, not only that all power should be derived from the people, but that those intrusted [sic] with it should be kept in independence [sic] on the people, by a short duration of their appointments." *Id.* Therefore, "[t]he natural cure for an ill-administration, in a popular or representative constitution, is a change of men." *The Federalist No. 21* (Alexander Hamilton).

But under the minimal requirements of the Intelligible Principle test, this carefully crafted electoral system no longer ensures that elected lawmakers are politically accountable for the vast majority of legal rules and obligations imposed in our Republic, because Congress can employ purposefully broad and ambiguous statutes as a means to avoid democratic accountability. *See generally* David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (Yale University Press 1995). By giving the bulk of legislative responsibility to executive agencies, Congress has found a way to insulate *itself* from the voters. *Id.* The result of this dynamic "is power without accountability—a useful formula politically but an abysmal one for policymaking." James Gattuso, *Testimony before The Subcommittee on Regulatory Reform, Commercial and Antitrust Law in the Committee on the Judiciary*, U.S. House of Representatives (Mar. 5, 2013).[3] "[L]egislative abdication is the reigning modus operandi," with the

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[3] https://www.heritage.org/testimony/reins-act-2013-promoting-jobs-growth-and-competitiveness. (last visited May 15, 2018).

result being "an executive that subsumes much of the tripartite structure of government." Neal K. Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 Yale L.J. 2314, 2316 (2006).

And despite "widely assumed [] instruments of political control of bureaucratic policymaking," such as complex statutory procedures, notice and comment periods, and the requirements that agencies provide a reasonable interpretation of their enabling statutes, Daniel E. Walters, *Litigation-Fostered Bureaucratic Autonomy: Administrative Law Against Political Control*, 28 J.L. & Pol. 129-30 (2013), agencies themselves have little accountability to Congress. *See, e.g.*, Jonathan Turley, *The rise of the fourth branch of government*, Washington Post (May 24, 2013) (comparing the effectiveness of congressional control over agency action to operating a train with an on/off switch). Nor are presidential elections an adequate substitute. Rationally ignorant voters have little concrete idea why they are voting for a particular candidate, *see generally* Bryan Caplan, *The Myth of the Rational Voter: Why Democracies Choose Bad Policies* (Princeton University Press 2007), and even less regarding specific policy proposals for the Executive Branch, Robert A. Dahl, *Myth of the Presidential Mandate*, 105 Pol. Sci. Q. 355, 355–72 (1990). The unlawful delegation of rulemaking authority to agency career employees, *see generally* Complaint, *Moose Jooce, et al., v. FDA*, No. 1:18-cv-00203-CRC (D.D.C. Jan 30, 2018),[4] protection of even relatively high level policy staff through civil service rules, and the natural institutional interests of

[4]https://pacificlegal.org/documents/complaint-vape-dc/.

agencies, *see* Ernesto Dal Bo, *Regulatory Capture: An Overview*, Oxford Review of Economic Policy, vol. 22 no. 2 (2006), further insulate agencies and their staffs from presidential oversight.

The result is a class of unelected bureaucrats beyond the reach of the electorate that are responsible for the bulk of lawmaking. *See* Turley, *supra* ("One study found that in 2007, Congress enacted 138 public laws, while federal agencies finalized 2,926 rules, including 61 major regulations.").[5] According to the Founders, "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments . . . ." *The Federalist No. 51* (Alexander Hamilton or James Madison). But the current dynamic is something that the Framers did not foresee: a branch of the federal government purposefully giving away its own power to avoid democratic consequences.

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[5]https://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faaad0-c2ed-11e2-9fe2-6ee52d0eb7c1_story.html?utm_term=.600a52f35bee.

C. When Combined with Doctrines of Judicial Deference, the Intelligible Principle Test Leads to Arbitrary Individual Rights Violations

In addition to lacking a textual basis in the Constitution and frustrating democratic accountability, the Intelligible Principle test, when combined with judicial deference to executive agency interpretations of statutes, can lead to arbitrary violations of individual constitutional rights.

During the Founding era, "the United States—unlike European countries—lacked a well-defined bureaucratic apparatus." Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State*, 18 (Harvard University Press 1990). Therefore, regulations "could be found principally in judge-made rules of the common law. From corporate and property law to family law, judges performed the basic regulatory functions that might otherwise have been carried out by bureaucrats." *Id.* This ancient judicial function is reflected in our constitutional design and our earliest legal precedents. *See* U.S. Const. art. III, § 1 (the people vest judicial power in "one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish.") *and Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *see also Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014), Oral Argument Trans., p. 51 (statement of Chief Justice Roberts) (describing the authority of federal courts to decide cases as a "constitutional birthright").

"Courts were preferable to administrators, in the Founders' view, because of judicial adherence to the intentions of the law as opposed to administrators' using the law as mere guidance for their own lawmaking." Joseph Postell, *From Administrative State to Constitutional Government.*[6] As the body constitutionally charged with interpreting and applying the law, courts function as "neutral decision makers" insulated from political pressures "who will apply the law as it is, not as they wish it to be." *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

1. General Judicial Deference Doctrines

But in recent decades this judicial function was weakened for a variety of questionable justifications. The Intelligible Principle test allows Congress to delegate legislative authority if a statute provides the barest of guidelines. But under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), executive agencies can go a step further by imposing their *own interpretations* of the statute's "intelligible principle" on both the courts and the public. *See generally* Note, *Justifying the* Chevron *Doctrine: Insights from the Rule of Lenity*, 123 Harv. L. Rev. 2043 (2010). Relatedly, under *Auer v. Robbins*, 519 U.S. 452 (1997), agencies are given free interpretative rein over not only their own enabling statutes, but over the interpretation of their own regulations. *See generally* Conor Clarke, *The Uneasy Case Against Auer and Seminole Rock*, 33 Yale L. & Pol'y Rev. 175 (2014). Finally, under *National Cable*

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[6] http://thf_media.s3.amazonaws.com/2012/pdf/sr116.pdf.

& Telecommunications Association v. Brand X Internet Services, 545 U.S. 967 (2005), agencies are empowered to toggle from one interpretation to another, depending upon nothing more than the ebb and flow of political power. *See generally* Christopher J. Walker, *Avoiding Normative Canons in the Review of Administrative Interpretations of the Law: A Brand X Doctrine of Constitutional Avoidance*, 64 Admin. L. Rev., 139-90 (2012). The collective result of these cases is not merely the improper delegation of legislative power to the Executive Branch, but rather the creation of a whole new category of lawmaking power vested in administrative agencies with neither the consent of the people nor judicial review. Such unchecked power abrogates many cherished constitutional guarantees.

As a result of minimal guidance from Congress and agency interpretations owed extreme judicial deference, an entire host of otherwise fundamental constitutional protections are cast aside when agencies apply their vast regulatory power to individual Americans. Bedrock protections like the Rule of Lenity, which instructs courts to interpret ambiguous criminal laws to favor individuals charged—*United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L. Ed. 37 (1820)—are rejected for deference to agency interpretations. "[Deference doctrines] allow one administration to criminalize conduct within the scope of [an] ambiguity, the next administration to decriminalize it, and the third to recriminalize it, all without any direction from Congress." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729 (6th Cir. 2013).

2. The "No Law to Apply" Doctrine Is Routinely Abused

A particularly problematic example of mixing the Intelligible Principle standard with other deference doctrines is the so-called "no law to apply" doctrine. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (discussing "statutes [] drawn in such broad terms that in a given case there is no law to apply."). Under decisions by this Court, judicial review of final agency action is unavailable under the Administrative Procedure Act when Congress has provided no substantive law to apply. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Scholars have noted "the tension between the classic Non-Delegation claim and this unreviewability doctrine." Thomas W. Merrill, *Delegation and Judicial Review*, 33 Harv. J.L. & Pub. Pol'y 73, 82 (2010). "The Non-Delegation Doctrine says that Congress must supply an intelligible principle to guide executive action, in part to provide a basis for meaningful judicial review; the unreviewability doctrine says that if Congress supplies no principle at all the action is unreviewable." *Id.* Yet courts have refused to strike down such statutes for want of an intelligible principle, thereby allowing executive agencies to have it both ways: the statute granting them power survives, and the agency discretion stands completely unchecked.

The "no law to apply" doctrine has been greatly expanded beyond its original context by several federal circuit courts to insulate a wide range of decisions that profoundly impact property rights and individual livelihoods. *See, e.g., Building Industry Association of the Bay Area v. U.S. Dep't of Commerce*,

792 F.3d 1027, 1034 (9th Cir. 2015) (relying upon "no law to apply doctrine" to deny review of decision not to exclude an area from a critical habitat designation under the Endangered Species Act). Like the Ninth Circuit, the Fifth Circuit has held that an agency decision not to exclude an area from a critical habitat designation for an endangered species—despite dramatic economic impacts to the land owner and absolutely no benefit to the species—is immune from judicial review for want of any law to apply to such a decision. *See Markle Interests, L.L.C., v. U.S. Fish & Wildlife Serv.*, 827 F.3d 462 (5th Cir. 2016), *cert. granted, Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 138 S. Ct. 924 (2018). These decisions all show the extent to which the "intelligible principle" standard has been reduced to a fig leaf: a law that grants absolute and unreviewable discretion to an agency official cannot also be said to contain a sufficiently definitive "intelligible principle" to satisfy Non-Delegation.

The combined effect of the Intelligible Principle test and extreme judicial deference is to move from a government with legislative power in elected Members of Congress to a government that, through the Executive Branch (including bureaucracies insulated even from presidential control with for-cause removal protections), acts arbitrarily and without any check or balance on its authority. To remedy this constitutionally perilous situation, this Court should hold that the current Intelligible Principle test does not effectively prevent the unconstitutional re-delegation of legislative power, and should instead rely upon a workable and analogous line already in operation with deep roots in the common law.

II

THIS COURT IS CAPABLE OF DRAWING A MORE EFFECTIVE LINE TO PREVENT UNCONSTITUTIONAL RE-DELEGATIONS

Reaffirming the Non-Delegation Doctrine in theory still leaves a practical question for the Court to address. Over the last several decades, several members of this Court have suggested that even if delegation is impermissible *in principle*, the difficulty in drawing the line between impermissible executive lawmaking and permissible executive discretion may be particularly difficult and elude judicial definition. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) ("[W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts."). *See also American Trucking*, 531 U.S. at 474-75 ("[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'") (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)). Some scholars have likewise argued that practical line-drawing difficulties make enforcing the doctrine difficult or impossible. *See, e.g.*, Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 Cardozo L. Rev. 775, 791 (1999) ("The line-drawing problems are simply insuperable, which is why the Supreme Court . . . has resisted any robust nondelegation doctrine . . . ."); Steven F. Huefner, *The Supreme Court's Avoidance of the Nondelegation Doctrine in* Clinton v. City of New York*: More Than "A Dime's Worth of*

Difference," 49 Cath. U. L. Rev. 337, 415 (2000) (noting this Court's refusal to "tackle the line-drawing problem of how to invest new life in the non-delegation doctrine without unleashing a parade of horribles . . . .").

This reluctance is misguided. This Court is demonstrably capable of finding and enforcing the line past which discretion turns into lawmaking power, because this Court has for many years *already* drawn such a line in a closely analogous doctrine: Void for Vagueness cases.

A. The Void for Vagueness and Non-Delegation Doctrines Serve the Same Separation of Powers Purpose

This Court has consistently identified two independent justifications for invalidating impermissibly vague statutes. The first of these justifications is the Due Process right of fair notice: because this Court "assume[s] that man is free to steer between lawful and unlawful conduct," this Court "insist[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

The second justification is structural: this Court insists that "laws must provide explicit standards for those who apply them," because "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis . . . ." *Id.* at 108-09. This Court recognized as far back as 1875 that "if the legislature could set a net large enough to catch all

possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large," the effect would "to some extent, substitute the judicial for the legislative department of government." *United States v. Reese*, 92 U.S. 214, 221 (1875). *See also United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 92 (1921) (noting that vague laws "delegate legislative power"); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1227-28 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (observing that vague laws not only "risk allowing judges to assume legislative power" but also "threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions").

It is the second of these two purposes that is directly comparable to the Non-Delegation Doctrine. Just like the Non-Delegation Doctrine, this aspect of the Void for Vagueness Doctrine "is a corollary of the Separation of Powers—requiring that Congress, rather than the Executive or Judicial Branch, define what conduct is sanctionable and what is not." *Dimaya*, 138 S. Ct. at 1212 (plurality op.); *see also id.* at 1227 (Gorsuch, J., concurring in part and concurring in the judgment) ("[I]t would be a mistake to overlook the [Void for Vagueness] doctrine's . . . debt to the separation of powers."). And just like the Non-Delegation Doctrine, this aspect of the Void for Vagueness Doctrine is necessitated by the Constitution's vesting of lawmaking power solely in the Legislative Branch. Since "legislatures may not consent, through the delegation of broad discretion, to executive lawmaking, . . . vague laws are objectionable because they vest so much discretion in the police that 'enforcement' decisions are, in effect, lawmaking."

Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 Vand. L. Rev. 1497, 1550 (2007). Thus, "[v]ague statutes have the effect of delegating lawmaking authority to the executive," thereby making it "likely that any individual enforcement decision will be based on a construction of the statute that accords with the executive's unstated policy goals . . . ." Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1806 (2012). *See also* Carissa Byrne Hessick, *Vagueness Principles*, 48 Ariz. St. L.J. 1137, 1145 (2016). ("[T]he non-delegation principle underlying the vagueness doctrine is a concern that vague laws allow law enforcement and fact finders to pursue their own policy agenda.").

The Void for Vagueness and Non-Delegation Doctrines are thus closely related variants of the same fundamental principle: that legislative power may not be re-delegated from the legislature to any other government actor or third party. The two doctrines differ only in the *recipients* of that re-delegated power. The Void for Vagueness Doctrine requires "that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges." *Dimaya*, 138 S. Ct. at 1212 (plurality op.) (citing *Kolender v. Lawson*, 461 U.S. 352, 357–358 (1983)). The Non-Delegation Doctrine analogously requires that a statute provide the same standards to govern the actions of Executive Branch rulemakers. But in either case, the fundamental inquiry is the same: whether a statute grants so much discretion that legislative power has effectively been re-delegated from the legislature to another entity.

The fact that the enquiry in either type of case is the same has a crucial practical consequence: this Court has *already* successfully drawn the line between permissible and impermissible grants of discretion for nearly a century, in its extensive body of Void for Vagueness cases. The cases that this Court has decided over the years serve both as an illustration that this Court is up to the line-drawing task and as a robust set of precedents that can aid this Court in drawing the same line in all Non-Delegation cases. A survey of some of the statutes that this Court has struck down as void due to their vagueness demonstrates that SORNA clearly crosses the line to impermissible delegation.

B. This Court Has Previously Invalidated Many Statutes under the Void for Vagueness Doctrine for Granting Impermissibly Broad Discretion

While this Court has not invalidated a single statute under the Non-Delegation Doctrine itself since 1935, it has regularly applied the Void for Vagueness Doctrine to strike down excessive delegations. *See* Schoenbrod, *supra*, at 42 ("[U]nder the rubric of *void for vagueness* [the Supreme Court] has regularly struck down statutes that fail to define crimes clearly, on the basis that the legislature—rather than the police, judges, and juries—should state what constitutes a crime."). This Court has—for nearly a century—successfully drawn the line separating statutes granting the normal discretion inherent in executing the law and statutes granting impermissible unguided discretion that amounts to *creation* of law. By working to find and draw this line,

the Court has successfully enforced the principle that the Legislative Branch may not re-delegate lawmaking power through overly vague laws. A survey of these cases demonstrates both that this Court is capable of drawing the line past which discretion turns to lawmaking, *and* that the discretion granted to the Attorney General by SORNA is clearly beyond that line.[7]

One of the first statutes that this Court struck down as void for vagueness made it illegal for grocers "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries . . . ." *L. Cohen Grocery*, 255 U.S. at 86. The Court held that this language delegated lawmaking power to individual juries because there was no "fixing by Congress of an ascertainable standard of guilt . . . ." *Id.* at 89. The terms "unjust and unreasonable," which were neither defined elsewhere in the statute nor by prior case law, were so vague that "to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." *Id.*

Sixteen years later, this Court invalidated a Georgia state statute prohibiting "[a]ny attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State . . . ." *Herndon v. Lowry*, 301 U.S. 242, 246 n.2

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[7] While this Court has struck down many more laws under the Void for Vagueness Doctrine than will be listed here, this survey will be limited to those where the Court explicitly invoked Separation of Powers concerns as a reason for invalidating the statute.

(1937). As the Court pointed out, this language was so broad that it might seem to apply to anyone who "ought to have foreseen that his utterances might contribute in any measure to some future forcible resistance to the existing government . . . ." *Id.* at 262. No limiting principle was established as to how long a time frame could be imagined when determining that resistance might eventually be induced. "If a jury returned a special verdict saying twenty years or even fifty years, the verdict could not be shown to be wrong." *Id.* at 263. For that reason, the law "license[d] the jury to create its own standard in each case." *Id.*

Likewise, this Court struck down as impermissibly vague a statute which made it illegal "for any person to stand or loiter upon any street or sidewalk * * * after having been requested by any police officer to move on." *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965). The Court explained that such a broad law "'does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat.'" *Id.* (quoting *Cox v. State of Louisiana*, 379 U.S. 536, 579 (1965) (Black, J., concurring in part and dissenting in part)).

After *Shuttlesworth* came perhaps the single most analogous case to the present one, *Giaccio v. State of Pennsylvania*. In that case, this Court invalidated a Pennsylvania law which allowed juries, after acquitting a defendant of any nonfelony charge, to "determine, by their verdict, whether the county, or the prosecutor, or the defendant shall pay the [court] costs . . . ." 382 U.S. 399, 400-01 (1966). As the Court explained, this statute "contain[ed] no standards at all" to guide the jury in making this choice, and thus

jurors necessarily made "determinations of the crucial issue upon their own notions of what the law should be instead of what it is." *Id.* at 403.

Giaccio is also notable as confirmation that it is not just the creation of criminal penalties that jeopardizes the Separation of Powers, but also the creation of civil penalties and other monetary obligations. Considering that the consequences of many civil enforcement regimes are more devastating and destructive to the citizenry than the penalties for some crimes, there is no reason to weigh this Court's Separation of Powers concerns more heavily in the criminal than civil context. *See Dimaya*, 138 S. Ct. at 1229 (Gorsuch, J., concurring) ("[T]he happenstance that a law is found in the civil or criminal part of the statute books cannot be dispositive. . . . In fact, if the severity of the consequences counts when deciding the standard of review, shouldn't we also take account of the fact that today's civil laws regularly impose penalties far more severe than those found in many criminal statutes?").

Soon after, the Court struck down an obscenity ordinance which forbade movie theater owners from "knowingly admit[ting] a youth under age 16" to a movie judged "not suitable for young persons" by the city's Motion Picture Classification Board. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 680 (1968). The board itself was instructed to find "not suitable for young persons" any film containing a violent scene "likely to incite or encourage crime or delinquency on the part of young persons" or any sexual scenes "likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest." *Id.* at 681. The Court

explained that because these standards left such wide discretion to the individual board members, the result would be "'regulation in accordance with the beliefs of the individual censor rather than regulation by law.'" *Id.* at 685 (quoting *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 701 (1959) (Clark, J., concurring in result)).

The next statute to fall was a Jacksonville, Florida vagrancy ordinance which criminalized, among other activities, "persons wandering or strolling around from place to place without any lawful purpose or object . . . ." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 156 n.1 (1972). The law was an invalid delegation because of the "unfettered discretion it place[d] in the hands of the Jacksonville police." *Id.* at 168. The true "law" would have effectively been created by the police, because there were "no standards governing the exercise of the discretion granted by the ordinance . . . ." *Id.* at 170. Rather than conforming to the requirements of written law passed by a legislature, the citizens of Jacksonville were in effect "required to comport themselves according to the life style deemed appropriate by the Jacksonville police and the courts." *Id.*

Two years later, this Court invalidated as impermissibly vague a Massachusetts statute that prohibited "treat[ing] contemptuously the flag of the United States . . . ." *Smith v. Goguen*, 415 U.S. 566, 568-69 (1974). Because the term "contemptuously" went undefined, the statute granted "unfettered latitude" to "law enforcement officials and triers of fact." *Id.* at 578. The statute had "a standard so indefinite that police, court, and jury were free to react

to nothing more than their own preferences for treatment of the flag." *Id.* The statute thus failed the constitutional "requirement that a legislature establish minimal guidelines to govern law enforcement." *Id.* at 574. This Court found once again that the discretion crossed a line such that the legislature had delegated away its lawmaking power: "Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law." *Id.* at 575.

This Court has also struck down a statute which required persons validly stopped by the police "to provide a 'credible and reliable' identification and to account for their presence . . . ." *Kolender*, 461 U.S. at 353. Fatally, the statute "contain[ed] no standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification." *Id.* at 358. Thus, the Court recognized that "the statute vest[ed] virtually complete discretion in the hands of the police to determine whether the suspect ha[d] satisfied the statute . . . ." *Id.* Even though many valid statutes vest *some* discretion in police, this Court was up to the task of determining that this level of discretion crossed the line such that police, not legislators, were the ones truly creating law.

More recently, this Court struck down a Chicago ordinance which prohibited failing to disperse after being instructed by a police officer, whenever that officer reasonably believed that at least one of the persons in a group was a gang member and that the group was "loitering." *City of Chicago v. Morales*, 527

U.S. 41, 47 (1999). The ordinance defined "loitering" as simply "remain[ing] in any one place with no apparent purpose." *Id.* (alterations in original). Once again, this Court determined that "[t]he broad sweep of the ordinance" violated "'the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Id.* at 60 (quoting *Kolender*, 461 U.S. at 358). The Court found that the statute impermissibly conferred "vast discretion" on the police, because the text of the statute "'provide[d] absolute discretion to police officers to decide what activities constitute loitering.'" *Id.* at 61 (quoting *City of Chicago v. Morales*, 687 N.E.2d 53, 63 (Ill. 1997)). Just like each of the previous cases, the ordinance fell on Separation of Power grounds, independent of any notice problem. Published police "regulations" might have provided some notice, but they would not have solved the Separation of Powers problem.

C. Void for Vagueness Precedents Provide a Solid Basis for Drawing the Line in Non-Delegation Cases

In each and every one of the cases just discussed, the statutory prescriptions were so standardless that they effectively re-delegated lawmaking power away from the legislature and to some other actor further down the road. Despite the fact that *some* discretion and inconsistency in application of written law is inevitable, this Court consistently confronted the necessary task of determining whether the discretion exceeded the limits of mere law *application* and crossed the line into law *creation*. This Court has proved capable of meeting this sometime-difficult line-drawing

challenge, just as it has in many other areas of Constitutional law.

Most relevant to the question of line-drawing in *Non-Delegation* cases, the vague statutes at issue in each of the cases discussed could easily be reimagined as vesting precisely the same level of discretion in an executive *rulemaker* rather than in police, judges, or juries, and in each case the reasoning of this Court would have required the same result. Suppose, for example, that the provision at issue in *Giaccio*, instead of vesting individual *juries* with the unguided choice as to who would pay costs, instead vested a single choice in the state attorney general, one that would apply to all future trials. Just as this Court determined for individual juries in the actual statute, this would have resulted in the state attorney general making a decision "upon [his] own notion[] of what the law should be instead of what it is." *Giaccio*, 382 U.S. at 403. The extent of abdication by the legislature would have been identical, and thus the violation of Separation of Powers would have been the same.

Likewise in *Smith v. Goguen*, suppose the law in question had vested the state attorney general with the power to define the meaning of "contemptuously" by promulgating regulations. His choice would have been just as unguided as the choices of police and juries were under the actual statute, and the resulting regulation would have been "nothing more than [his] own preferences for treatment of the flag." *Smith*, 415 U.S. at 578. Once again, because the result in *Smith* was derived from Separation of Powers concerns, the hypothetical statute would be invalid for precisely the same reasons.

None of these hypothetical alterations could possibly alleviate the Separation of Powers concerns that were present before such alterations, because clauses granting rulemaking power to an executive official add no additional legislatively created standards. Thus, the precedents set and the lines drawn by this Court in Void for Vagueness cases drawing the same lines in Non-Delegation cases. Put simply, if this Court can draw the line in Void for Vagueness cases (which it has), it can draw the line in Non-Delegation cases.

And this brings us to SORNA. Just as we can imagine a Void for Vagueness case transformed into a Non-Delegation case by shifting the discretion from individual enforcers to agency rulemakers, so can we imagine a transformation in the opposite direction. Suppose that instead of allowing the Attorney General unguided discretion in determining retroactivity, SORNA instead assigned this task to individual case workers for convicted sex offenders, such that each case worker could decide whether to deem a particular failure to register as a violation, for any reason or no reason. Such a statute would clearly be void for vagueness under the precedent set in *Giaccio*; the case workers would each be deciding what the law of retroactivity *should be*, not what it is. And since such discretion in the hands of individual enforcers clearly amounts to an exercise of legislative power, so must the identical discretion placed in the hands of a single executive rulemaker. SORNA grants the Attorney General the power to make his own law, and for that reason it violates the Separation of Powers at the heart of the Constitution's structure.

This Court need not formulate one definition that will determine for every future case whether the discretion granted veers into a re-delegation of lawmaking power. It is enough for this Court to operate as it always has; slowly illuminating the line through precedent and case-by-case determinations. *See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2606 (2012) ("We have no need to fix a line . . . . It is enough for today that wherever that line may be, this statute is surely beyond it."). This Court's precedents in Void for Vagueness cases show that enough of the line has already been illuminated to make clear that the standardless grant of power to the Attorney General in SORNA falls well beyond it.

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the Second Circuit should be reversed.

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Respectfully submitted,

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IN THE

Supreme Court of the United States

HERMAN AVERY GUNDY,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF SCHOLARS WHOSE WORK INCLUDES SEX OFFENSE STUDIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CITED AUTHORITIES

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CASES

Does #1–5 v. Snyder,
834 F.3d 696 (6th Cir. 2016).....3

In re J.B.,
107 A.3d 1 (Pa. 2014).....5, 17

In re J.C.,
221 Cal. Rptr. 3d 579 (Cal. Ct. App. 2017).....5

Smith v. Doe,
538 U.S. 84 (2003).....1, 3, 7, 17

United States v. Kebodeaux,
570 U.S. 387 (2013).....4, 7

STATUTES

34 U.S.C. § 20911(8).....5

34 U.S.C. § 20913(e).....18

34 U.S.C. § 20921.....18

34 U.S.C. § 20941(a).....18

ALASKA STAT. § 11.56.835.....18

ALASKA STAT. § 11.56.840.....18

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OTHER AUTHORITIES

75 Fed. Reg. 81849, 81851 (adopted Dec. 29, 2010) 11

About NSOPW, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, Dep't of Justice, https://www.nsopw.gov/en/Home/About/.....18

Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327 (2009) 10

Andrew Harris, Amy Phenix, R. Karl Hanson & David Thornton, *Static-99R Coding Rules* (Revised 2016), http://www.static99.org/pdfdocs/Coding_manual_2016_v2.pdf.....9

David Finkelhor, Richard Ormrod & Mark Chaffin, *Juveniles Who Commit Sex Offenses Against Minors*, Juvenile Justice Bulletin, Office of Juvenile Justice and Delinquency Prevention, Dep't of Justice (Dec. 2009).....5, 9

EULA BISS, ON IMMUNITY: AN INNOCULATION (2014) 19

Cited Authorities

Page

Ira Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495 (2015) 2-3

Jeffrey C. Sandler et al., *Does a Watched Pot Boil? A Time-series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 PSYCHOL. PUB. POL'Y & L. 284 (2008) 6

Leon Neyfakh, *Why Do So Many Ex-Cons End Up Back in Prison? Maybe They Don't*, SLATE, Oct. 29, 2015 6

Leslie Helmus, David Thornton, R. Karl Hanson & Kelly M. Babchishin, *Improving the Predictive Accuracy of Static-99 and Static-2002 with Older Sex Offenders: Revised Age Weights*, 24 SEXUAL ABUSE: J. RES. & TREATMENT 64 (2012) 9

Megan C. Kurlychek, Shawn D. Bushway, & Robert Brame, *Long-Term Crime Desistance and Recidivism Patterns– Evidence from the Essex County Convicted Felon Study*, 50 CRIMINOLOGY 71 (2012) 10

Michael C. Seto & Angela W. Eke, *Predicting Recidivism Among Adult Male Child Pornography Offenders: Development of the Child* Pornography Offender Risk Tool (CPORT), 39 L. & HUM. BEHAV. 416 (2015) 12

Cited Authorities

Page

Operation FALCON, U.S. MARSHALS SERVICE, https://www.usmarshals.gov/falcon/ 18

Patrick A. Langan, Erica L. Schmitt, & Matthew R. Durose, ***Recidivism of Sex Offenders Released in 1994***, Bureau of Justice Statistics, Dep't of Justice (Nov. 2003) 4, 5, 6, 7

R. Karl Hanson, Alyson Lunetta, Amy Phenix, Janet Neeley & Doug Epperson, ***The Field Validity of Static-99/R Sex Offender Risk Assessment Tool in California***, 1 J. Threat Assessment & Mgmt. 102 (2014).....10

R. Karl Hanson, Andrew J.R. Harris, Leslie Helmus & David Thornton, ***High Risk Sex Offenders May Not Be High Risk Forever***, 29 J. Interpersonal Violence 2792 (2014) 11, 12

R. Karl Hanson, Elizabeth Letourneau, Andrew J.R. Harris, L. Maaike Helmus & David Thornton, ***Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender***, 24 Psychol. Pub. Pol'y & L. 48 (2018) 13, 14, 15, 16

R. Karl Hanson & Kelly E. Morton-Bourgon, ***The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies***, 21 Psychol. Assessment 1 (2009).....10

Cited Authorities

Page

R. Karl Hanson, *Recidivism and Age: Follow-Up Data on 4,673 Sexual Offenders*, 17 J. Interpersonal Violence 1046 (2002) 16

Rachel E. Kahn, Gina Ambroziak, R. Karl Hanson & David Thornton, *Release from the Sex Offender Label*, 46 Archives Sexual Behav. 861 (2017) 14

Robert A. Prentky, Austin F. S. Lee, Raymond A. Knight & David Cerce, *Recidivism Rates among Child Molesters and Rapists: A Methodological Analysis*, 21 L. & Hum. Behav. 635 (1997) 8

Seung C. Lee, R. Karl Hanson, Nyssa Fullmer, Janet Neeley & Kerry Ramos, *The Predictive Validity of Static-99R Over 10 Years for Sexual Offenders in California: 2018 Update*, Saratso 19, http://saratso.org/pdf/Lee_Hanson_Fullmer_Neeley_Ramos_2018_The_Predictive_Validity_of_S_.pdf.....15

Sex Offender Enactments Database, National Conference of State Legislatures (Jan. 1, 2018), http://www.ncsl.org/research/civil-and-criminal-justice/sex-offender-enactments-database.aspx 17

Cited Authorities

Page

Sex Offender Registration and Notification Act (SORNA) State and Territory Implementation Progress Check, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, Dep't of Justice, Apr. 5, 2018, https://www.smart.gov/pdfs/SORNA-progress-check.pdf 5

Sex Offender Risk Assessment in California, SARATSO, http://www.saratso.org/docs/RA_summary_for_judges_attys_rev_1-3-17.pdf.....12

SORNA Substantial Implementation Review State of Alaska, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, Dep't of Justice (Nov. 2015), https://www.smart.gov/pdfs/sorna/alaska-hny.pdf 18

Static-99 Clearinghouse, STATIC-99/STATIC-99R, http://www.static99.org/ 10, 16

Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, and National Sex Offender Policy, 6 OHIO ST. J. CRIM. L. 51, 91–94 (2008) 17

William Rhodes et al., *Following Incarceration, Most Released Offenders Never Return to Prison*, 62(8) CRIME & DELINQ. 1003 (2014) 6

INTEREST OF *AMICI CURIAE*

Amici are scholars whose work includes leading studies of persons convicted of sexual offenses and the laws applied to them. *Amici* are concerned that judicial decisions regarding these offenders have sometimes relied upon misunderstandings about the re-offense risks they pose and the impact of laws applied to them. *Amici* wish to provide the Court with accurate information about these subjects. Short biographies of each *amicus* are appended to this brief.[1]

SUMMARY OF ARGUMENT

Discussions of sex offender registration take place against a backdrop of fear and loathing—fear that any change in law or practice that lifts registration requirements will result in great harm to society, and a sense that no restriction is too burdensome for someone who has committed a sex offense. Those on sex offender registries are seen as inveterate criminals who share essential character defects. Bolstering this view are the assumptions—widely shared and often cited by courts—that sex offenders re-offend at rates that are "frightening and high," *Smith v. Doe*, 538 U.S. 84, 103 (2003) (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)), and that their risk of re-offense remains high even years after they have been living as law-abiding citizens of their communities. *Id.* at 104.

---

1. No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented in writing to the filing of this brief.

Studies show that these assumptions are wrong. Those required to register as sex offenders vary in their traits, life experiences, character, and re-offense risk.[2] The vast majority do not re-offend. Moreover, a newly released offender's re-offense risk can be measured with simple actuarial scales, and that risk drops significantly for each year he spends in the community offense-free. Most offenders convicted before SORNA was enacted in 2006, and who have not re-offended ("pre-act offenders"), are therefore unlikely to commit a new sex offense. They are also unlikely to be free of registration requirements, even if petitioner prevails. States would require them to register, absent some considered policy decision to the contrary. We urge the Court and the parties to account for these facts and to focus on the merits of this case without the fear that clouds so many conversations about sex offenses.

ARGUMENT

Without the benefit of recent empirical research, hundreds of courts have parroted the assumption that registrants re-offend[3] at "frightening and high" rates.[4]

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2. For that reason, we generally use the term "registrant" rather than "sex offender," which can suggest the mistaken assumption that all registrants share a common and immutable character flaw.

3. Because the purpose of registration is to protect the community from new sex offenses, we use the term "re-offend" to refer to the commission of a subsequent sex offense, not to any subsequent offense regardless of whether it is sexual in nature. Studies often provide counts of both.

4. *See* Ira Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime*

With the benefit of such research, much of which has been conducted by *amici*, courts have begun to conclude the opposite. *See Does #1–5 v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 55 (2017) ("The record below gives a thorough accounting of the significant doubt cast by recent empirical studies on the pronouncement in *Smith* that '[t]he risk of recidivism posed by sex offenders is 'frightening and high.'"). In the sections that follow, we describe studies that courts have misinterpreted, describe research showing that most pre-act offenders are at a low risk for re-offending, and explain why most pre-act offenders will still be covered by state registration requirements even if petitioner prevails. Given these facts, the Court need not fear that its determination of the constitutional issue presented here will allow dangerous criminals to drop off of registries.

I. Statements about Re-offense Rates of Registrants Are Often Mistakenly Based on Counts of Nonrandom Subgroups.

Courts and policy makers often assume that empirical studies on the re-offense rates of one subgroup of registrants apply equally to all registrants. This assumption is mistaken. The enormous range of offenses that trigger registration requirements ensures that registrants are a heterogeneous group of people whose experiences, characters, and rehabilitative potential vary enormously. One cannot assume that studies that measure

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Statistics, 30 CONST. COMMENT. 495, 497 (2015) (noting that the phrase "frightening and high" was found in 91 judicial opinions and briefs in 101 cases). A Lexis case search for the phrase now results in 118 hits.

re-offense rates among one subgroup of registrants also apply to other subgroups.

Courts frequently miss this important point. For example, *United States v. Kebodeaux*, 570 U.S. 387, 395–96 (2013) acknowledges that some studies conclude that registrants have low recidivism rates, but states:

> There is evidence that recidivism rates among sex offenders are higher than the average for other types of criminals. See Dept. of Justice, Bureau of Justice Statistics, P. Langan, E. Schmitt, & M. Durose, Recidivism of Sex Offenders Released in 1994, p. 1 (Nov. 2003) (reporting that compared to non-sex offenders, released sex offenders were four times more likely to be rearrested for a sex crime, and that within the first three years following release 5.3% of released sex offenders were rearrested for a sex crime).

Because this Department of Justice report refers to its study population as "sex offenders,"[5] it seems reasonable to assume that the report covers all registrants. But it does not. The study population—adult, male, violent offenders released from prison—is in fact a higher-risk group than registrants in general.[6] These inclusion criteria

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5. Patrick A. Langan, Erica L. Schmitt, & Matthew R. Durose, *Recidivism of Sex Offenders Released in 1994*, Bureau of Justice Statistics, Dep't of Justice, at 1 (Nov. 2003) [hereinafter Langan DOJ Study].

6. *Id.* at 1 (noting that everyone in the study population was male), 3 (defining violent offender), 7 (giving age at time of release and noting that "a few" offenders were under age 18).

eliminate juvenile offenders, who are more than a third of those known to the police to have committed sex offenses against a minor.[7] Juveniles have lower re-offense rates,[8] and some subset of them is required to register under SORNA.[9] Those convicted of non-contact offenses are also excluded from the study population.[10] Most importantly, this study population—like those of many re-offense rate

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7. David Finkelhor, Richard Ormrod & Mark Chaffin, *Juveniles Who Commit Sex Offenses Against Minors*, Juvenile Justice Bulletin, Office of Juvenile Justice and Delinquency Prevention, Dep't of Justice at 3 (Dec. 2009). About half of juvenile sex offenders (that is, those reported as offenders in the National Incident-Based Reporting System) are between 15 and 17 years old. *Id.* at 1, 4.

8. *See, e.g.*, the studies gathered in *In re J.B.*, 107 A.3d 1, 17–18 (Pa. 2014).

9. SORNA requires compliant states to impose registration requirements on many juvenile offenders over 14, 34 U.S.C. § 20911(8), although some states have chosen not to comply with this requirement. *See, e.g.*, *In re J.B.*, 107 A.3d at 3; *see also* Sex Offender Registration and Notification Act (SORNA) State and Territory Implementation Progress Check, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, Dep't of Justice, Apr. 5, 2018, https://www.smart.gov/pdfs/SORNA-progress-check.pdf. Juveniles who commit sex offenses have been subject to lifetime registration. *In re J.C.*, 221 Cal. Rptr. 3d 579 (Cal. Ct. App. 2017) (12-year old subject to lifetime registration after sodomy conviction).

10. The study's definition of "violent" was broad, including offenders that "used or threatened force in the commission of the crime" and offenders that "while not actually using force . . .did not have the victim's 'factual' or 'legal' consent. Langan DOJ Study, *supra* note 5, at 3. The study did not, however, include those convicted of non-contact offenses. *Id.*

studies—is limited to individuals "released from State prisons."[11] As a result, it excludes the many registrants who never went to prison but were instead sentenced to probation or a brief stay in a county jail.

Offenders who never went to prison are far more likely to be first-time offenders than those who have served prison terms. Data from New York State show that 95% of those arrested for sex crimes are first-time sex offenders.[12]

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11. *Id.* at 1.

12. *E.g.*, a study of administrative data from New York State found that approximately 95% of sex offense arrestees between 1986 and 2006 were first-time sex offenders. Jeffrey C. Sandler et al., ***Does a Watched Pot Boil? A Time-series Analysis of New York State's Sex Offender Registration and Notification Law,*** 14 PSYCHOL., PUB. POL'Y & L. 284, 297 (2008). A related point was made by researchers who examined the Justice Department's analogous studies of released felons in general (not limited to those convicted of sex offenses), but their analysis applies equally to studies of sex offenders. William Rhodes et al., ***Following Incarceration, Most Released Offenders Never Return to Prison,*** 62(8) CRIME & DELINQ. 1003, 1020 (2014). A *Slate* interview with the authors provides additional context. Leon Neyfakh, ***Why Do So Many Ex-Cons End Up Back in Prison? Maybe They Don't,*** SLATE, Oct. 29, 2015, http://www.slate.com/articles/news_and_politics/crime/2015/10/why_do_so_many_prisoners_end_up_back_in_prison_a_new_study_says_maybe_they.html ("What [the Bureau of Justice Statistics is] reporting is true: If you take people who are released from prison during a given year, here's the rate at which they'll return. But it gets translated in people's heads as, 'Here's what happens to offenders in general.' In truth what you have is two groups of offenders: those who repeatedly do crimes and accumulate in prisons because they get recaptured, reconvicted, and resentenced; and those who are much lower risk, and most of them will go to prison once and not come back.").

By contrast, only 71.5% of the Justice Department sample are first-time sex offenders, and only 21.5% had no prior arrests at all.[13] First-time offenders are less likely to offend again than are those who have already offended more than once, a well-established fact illustrated by the data in this very study: the overall 5.3% re-offense rate for three years, quoted in *Kebodeaux*, is nearly double the re-offense rate for the subgroup of first offenders among them.[14] The higher proportion of repeat offenders among released prisoners means released prisoners will have a higher re-offense rate than will registrants generally. The study cannot be used to make general statements about registrants.

A similar issue arises in *Smith v. Doe*, where this Court considered Alaska's sex offender registration statute, which required registration for either 15 years or for life, depending upon the offense. 538 U.S. at 90. The Court stated:

> The duration of the reporting requirements is not excessive. Empirical research on child molesters, for instance, has shown that, "[c]ontrary to conventional wisdom, most

13. Langan DOJ Study, *supra* note 5, at 26 (Table 27), 28 (Table 30). 78.5% of those in the study were convicted of some prior crime. *Id.* at 26 (Table 27). 28.5% of those in the study were convicted of a prior sex crime. *Id.* at 28 (Table 30).

14. The rate for first offenders in the sample was 3.3%, which is 62% of the 5.3% overall rate. *Id.* at 26–27 (Table 27, Table 29). The re-offense rate was approximately 4% for those with 2 or 3 prior arrests for some type of crime, 6% for those with 4 to 6 prior arrests, 7% for those with 7 to 10 prior arrests, and 8% for those with 11 to 15 prior arrests. *Id.* at 27 (Table 29).

> reoffenses do not occur within the first several years after release," but may occur "as late as 20 years following release." National Institute of Justice, R. Prentky, R. Knight, & A. Lee, U.S. Dept. of Justice, Child Sexual Molestation: Research Issues 14 (1997). *Id.* at 104.

The cited quotation comes from a summary of a study published the same year in a peer-reviewed professional journal. The more complete account provided in the journal article explains that the study sample consisted of 136 rapists and 115 child molesters released from the Massachusetts Treatment Center for Sexually Dangerous Persons, which had been established "for the purpose of evaluating and treating individuals convicted of repetitive and/or aggressive sexual offenses."[15]

In other words, the study did not report the re-offense rates of "child molesters," much less all registrants, but of a subgroup incarcerated in a special facility for sexual offenders presenting a particularly high risk. The paper itself cautions that "[s]exual offenders sampled from general criminal populations, from offenders committed to a state hospital and from a maximum security psychiatric hospital, are likely to differ in ways that would affect their recidivism rates and make cross-sample comparisons difficult."[16] Those who have already re-offended multiple times may present a risk for re-offending again years later, but one cannot assume that risk applies equally

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15. Robert A. Prentky, Austin F. S. Lee, Raymond A. Knight & David Cerce, *Recidivism Rates among Child Molesters and Rapists: A Methodological Analysis*, 21 L. & Hum. Behav. 635, 637–38 (1997).

16. *Id.* at 636 (citations omitted).

to all registrants, or even to all those who commit a sex offense against a child, one third of whom are children themselves.[17] Once again, the study's results cannot be generalized.

II. Re-offense Risk Declines over Time for All Registrant Groups, Including Those Who Are Initially Higher Risk.

One reason the study population matters so greatly in this field of research is that the legal label "sex offender" is applied to a group of people with widely varying psychological traits who present a wide range of re-offense risks. For that same reason, even if one were to construct a study based on a representative sample of all registrants, it would be of limited use to courts and policy makers. There are far more accurate and practical ways to estimate the re-offense risk posed by individual registrants, or by groups of registrants who share a similar risk profile. The most common way is by using the Static-99R, a 10-item actuarial scale that assesses the re-offense risk of adult males who have committed a sex crime.[18] It is the most widely used sex offense risk

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17. *See* Finkelhor et al., *Juveniles Who Commit Sex Offenses*, *supra* note 7, at 1–2.

18. The ten items cover demographics, sexual criminal history (e.g., prior sexual offense), and general criminal history (e.g., prior non-sexual violence). *See, e.g.*, Leslie Helmus, David Thornton, R. Karl Hanson & Kelly M. Babchishin, *Improving the Predictive Accuracy of Static-99 and Static-2002 with Older Sex Offenders: Revised Age Weights*, 24 SEXUAL ABUSE: J. RES. & TREATMENT 64, 65 (2012); *see also* Andrew Harris, Amy Phenix, R. Karl Hanson & David Thornton, *Static-99R Coding Rules* (Revised 2016), http://www.static99.org/pdfdocs/Coding_manual_2016_v2.pdf. Such "structured" risk assessment tools are more accurate

assessment tool in the world.[19] The State of California has commissioned several studies that validated its predictive accuracy for adult males on the California registry.[20]

While the Static-99R is a well-validated instrument for assessing re-offense risk for a newly released offender, that risk level is not static. The most well-established finding in criminology is that the likelihood a released felon will re-offend declines with each year after release he has remained offense-free.[21] "The general tendency for recidivism risk to decline over time is among the best replicated results in empirical criminology. It is probably not an exaggeration to say that any recidivism study with more than a 2- or 3-year follow-up period that did not find a downward-sloping marginal hazard would be immediately suspect."[22]

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than clinical assessments. R. Karl Hanson & Kelly E. Morton-Bourgon, *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, 21 PSYCHOL. ASSESSMENT 1, 6–8 (2009).

19. *See* Static-99 Clearinghouse, STATIC-99/STATIC-99R, http://www.static99.org/.

20. *E.g.*, R. Karl Hanson, Alyson Lunetta, Amy Phenix, Janet Neeley & Doug Epperson, *The Field Validity of Static-99/R Sex Offender Risk Assessment Tool in California*, 1 J. THREAT ASSESSMENT & MGMT. 102 (2014).

21. Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327 (2009). This now classic study, funded by the Department of Justice, followed 88,000 individuals arrested in New York in 1980. *Id.* at 335.

22. Megan C. Kurlychek, Shawn D. Bushway & Robert Brame, *Long-Term Crime Desistance and Recidivism Patterns–Evidence from the Essex County Convicted Felon Study*, 50 CRIMINOLOGY 71, 75 (2012).

Two widely-cited studies by the developers of the Static-99R show that the same is true for sex offenders. Every year a sex offender remains at liberty without having re-offended reduces the likelihood he will re-offend in the future. This pattern prevails no matter the offender's initial risk level at the time of release. Sex offenders who present a high risk of re-offense at the time of their release also become low-risk with passing years, in predictable trajectories that depend upon their original risk level. Therefore, the pre-act offenders at issue in this case—those who committed a sex offense before July 2006, but not since—are likely to pose far lower re-offense risk than that of registrants in general.[23]

The first of these studies, published in 2014, combined the data from 21 prior studies that had, in total, followed 7,740 adult male sex offenders after their release from custody.[24] The follow-up periods varied with the original

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23. The studies by R. Karl Hanson, et al. discussed infra in this Section effectively rebut the mistaken assumption in the DOJ's Final Rule to SORNA that "the public safety concerns sex offenders present, are similar, whether a sex offender's conviction occurred before or after SORNA's enactment." DOJ Final Rule, Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. 81849, 81851 (adopted Dec. 29, 2010). Some subset of offenders will have committed a sex offense before July 2006, but will have been released only recently, or still be imprisoned. For further discussion on those offenders, see Section III.

24. R. Karl Hanson, Andrew J.R. Harris, Leslie Helmus & David Thornton, *High Risk Sex Offenders May Not Be High Risk Forever*, 29 J. Interpersonal Violence 2792, 2794–95 (2014). This study examined re-offending by adult men only, because the Static-99R has not been validated for women, juveniles, or some non-contact offenders. But similar tools have been developed to measure re-offense risk for these

study. They were 8.2 years on average, but as long as 31 years.[25] The Static-99R was used to classify offenders as High, Moderate, or Low-risk for sexual re-offending at the time of release. The chart reprinted below, taken from the study,[26] shows the proportion in each group who had committed no new sex offense at years 1 to 21 after release. All three groups begin at 1.0, since at the time of release no one had yet re-offended. The Static-99R's predictive power is shown by the separation of the three lines in the years after release. The top line, for low-risk offenders, is at .95 after 20 years—95% of this low-risk group was still offense-free 20 years after release into the community. Of the high-risk group, by contrast, about

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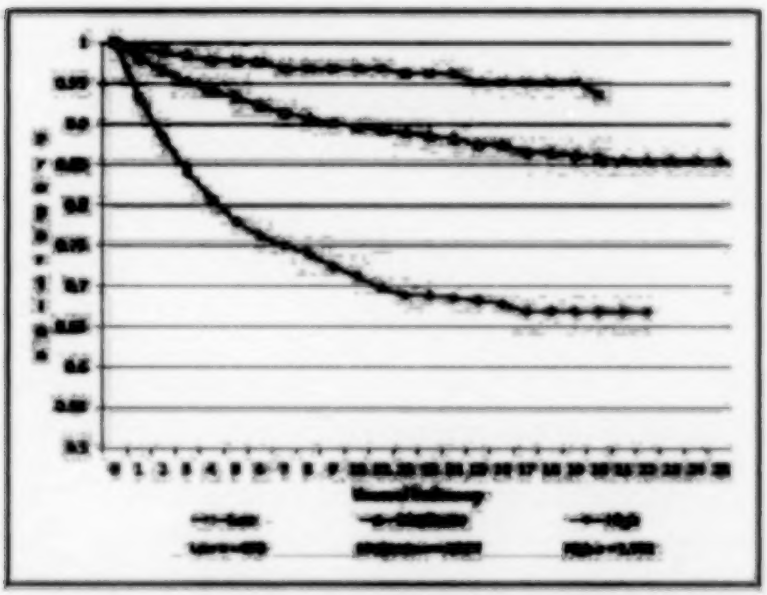
lower risk groups as well. After California's SARATSO committee adopted the Static-99R as the official risk assessment tool for adult males, it developed and adopted an analogous tool for juvenile males, the JSORRAT-II. *See* Sex Offender Risk Assessment in California, SARATSO, http://www.saratso.org/docs/RA_summary_for_judges_attys_rev_1-3-17.pdf ("[The SARATSO committee] chooses the official risk assessment instruments authorized for use in California. ([Calif.] Pen. Code, § 290.04."). (SARATSO is an acronym for "State Authorized Risk Assessment Tool for Sex Offenders.") Other researchers have developed an analogous tool to predict re-offending among those convicted of possessing child pornography. Michael C. Seto & Angela W. Eke, *Predicting Recidivism Among Adult Male Child Pornography Offenders: Development of the Child Pornography Offender Risk Tool (CPORT)*, 39 L. & Hum. Behav. 416 (2015).

25. In 10 of the 21 studies re-offense was defined as a new conviction for a sex offense; in 11, re-offense was defined as the filing of new sex offense charges. Hanson et al., *High Risk Sex Offenders May Not Be High Risk Forever*, *supra* note 24, at 2797 (Table 1).

26. *Id.* at 2799 (Figure 1).

65% were still offense-free after 20 years. So about 35% of the high-risk group had been charged with or convicted of a new sex offense. But the key finding is how the curves flatten over time. There are fewer and fewer new offenders with each year after release. The proportion who are still offense-free hardly changes at all after about 15 years, because in the years following, there are very few new offenders.



A 2018 paper re-analyzed the data to focus more clearly on the question of how long after release it takes for a legally-compliant offender to be treated as no longer presenting an unacceptable risk of sexual re-offending.[27] For that

27. R. Karl Hanson, Elizabeth Letourneau, Andrew J.R. Harris, L. Maaike Helmus & David Thornton, *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, 24 PSYCHOL. PUB. POL'Y & L. 48, 50 (2018).

analysis one must decide on the level of risk to accept—the level to treat as desistance from offending. Because no group in the population presents a zero sex offense risk, one must choose a suitable comparison group with a non-zero risk level. Data on the rate of spontaneous "out of the blue" sexual offending among those with a criminal conviction but no history of sexual offenses suggested to the authors a rate of 2%.[28] Nonsexual offenders are not, of course, placed on sex offender registries. The different treatment of sexual offenders should be based on a perceptably higher risk of sexual offense.

Offenders followed in this study were classified in one of five categories, from "Very Low" through "Well Above Average" risk, on the basis of their Static-99R score.[29] The likelihood of a future sexual offense for those in each category can be adjusted at six-month intervals in the years following release, to reflect the absence of any sexual reoffending up to that point. These "hazard rates" for each of the five risk categories, for a period of 24 years following release, are shown on the chart that

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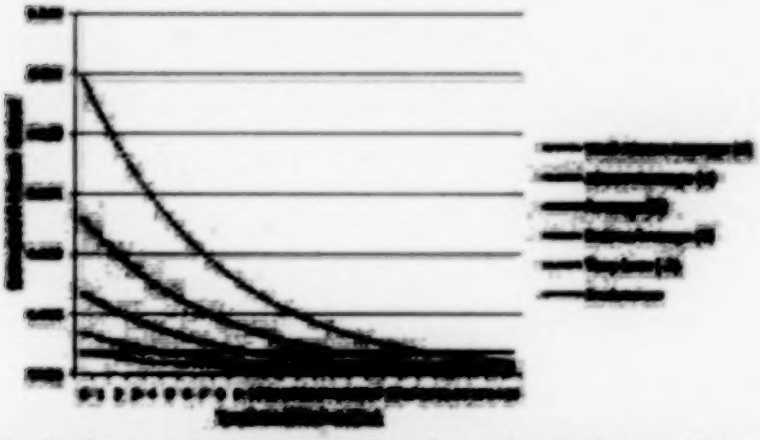
28. Rachel E. Kahn, Gina Ambroziak, R. Karl Hanson & David Thornton, *Release from the Sex Offender Label*, 46 Archives Sexual Behav. 861, 862 (2017); *see also* Hanson et al., *Reductions in Risk Based on Time Offense-Free*, *supra* note 27, at 49. The article by Kahn et al. found that the median rate of post-release sexual offending for five studies of adult (non-sexual) offenders was 1.30% (range of 0.84–3.18%). *Release from the Sex Offender Label* at 862. The five studies used reconviction as the recidivism criterion. A higher rate would presumably be found in studies using re-arrest as the criterion.

29. Hanson et al., *Reductions in Risk Based on Time Offense-Free*, *supra* note 27 at 51, 54–56.

follows, reproduced from the 2018 study.[30] The horizontal black line shows the 2% "desistance" rate against which each group's hazard rate can be compared.



The highest risk group remains above the desistance level for a long time—about 21 years. But a recent study found that in California only 33 of a random sample of 371 adult male registrants (8.8%) were in this high-risk category.[31] Another 74 (20%) were above average in risk.[32] More than 70% of registrants were thus in the three lower risk categories that reach desistance by the 10th year after release, if they have not reoffended.

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30. *Id.* at 55 (Figure 2).

31. Seung C. Lee, R. Karl Hanson, Nyssa Fullmer, Janet Neeley & Kerry Ramos, ***The Predictive Validity of Static-99R Over 10 Years for Sexual Offenders in California: 2018 Update***, SARATSO 19, http://saratso.org/pdf/Lee_Hanson_Fullmer_Neeley_Ramos_2018_The_Predictive_Validity_of_S_.pdf.

32. *Id.*

The individuals at issue in this case were convicted before July of 2006 and have not since been convicted of a sex offense. We do not know the proportion who have been at liberty for ten years or more, but it must be substantial. We do know that whenever they were released, their risk of offending has been declining since their release. Those just recently released from a pre-2006 conviction would likely have served long terms, which suggests they are older than others at the time of their release—and age itself reduces the risk of sexual re-offense,[33] independently of years at liberty without re-offending.[34] We also know that some would have been in lower risk categories at the time of release, and would thus have reached desistance risk levels within five years. Finally, we know that more of those who would be classified in the highest risk category at the time of their release will soon re-offend, than those in the lower risk category—but that re-offending removes them from the group at issue in this case. That means that the proportion of each year's release "class" who would initially be classified higher risk will decline in the years immediately following their release. In sum, there is good reason to believe that a substantial proportion of the offenders at issue in this case present relatively low risks of committing a new sex offense.

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33. R. Karl Hanson, *Recidivism and Age: Follow-Up Data on 4,673 Sexual Offenders*, 17 J. Interpersonal Violence 1046, 1056, 1059 (2002); Helmus et al., *Revised Age Weights*, *supra* note 18, at 78.

34. Hanson et al., *Reductions in Risk Based on Time Offense-Free in the Community*, *supra* note 27, at 54. The Static-99R score takes account of age at release in estimating the initial risk level. *See* Static-99 Clearinghouse, Static-99/Static-99R, http://www.static99.org/.

III. Eliminating the Attorney General's Rulemaking Authority over Pre-Act Offenders Will Not Result in Inability to Monitor High-Risk Registrants.

Since at least 1996, each state has run its own sex offender registry. *Smith v. Doe*, 538 U.S. at 89–90. Many pre-act offenders will be required to register on state registries regardless of the Court's decision in this case. The only people freed of registration requirements if petitioner prevails would be those who meet two criteria: the states have decided public policy does not require their registration,[35] *and* they have not re-offended since SORNA's enactment—an inherently low-risk group.[36] Because failure to register is a crime in every state, criminal penalties would remain in place for those who disobey state law.[37]

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35. States have made a variety of policy choices about who should be listed on their registries. For example, some states refuse to register juveniles, due in part to a judgment that their rehabilitative potential is high and re-offense risk is low. *See, e.g.*, *In re J.B.*, 107 A.3d at 3; *see also* Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 Ohio St. J. Crim. L. 51, 91–94 (2008) (describing state-specific concerns with SORNA's requirements, including concerns about registering juveniles).

36. *See supra* Section II. Those who have been at liberty for some time will be affected by this Court's decision only if they have not reoffended since their release. Those who have served long sentences and only recently been released will almost certainly face state penalties if they fail to register. *See* Sex Offender Enactments Database, National Conference of State Legislatures (Jan. 1, 2018), http://www.ncsl.org/research/civil-and-criminal-justice/sex-offender-enactments-database.aspx.

37. SORNA requires that "Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal

A decision in the petitioner's favor would not have any effect on the National Sex Offender Registry, which "links public state, territorial, and tribal sex offender registries" from a single website.[38] The National Registry would still capture all those on state registries. Nor would a decision in petitioner's favor affect "Operation FALCON," the federal government's program to assist states in locating and apprehending sex offenders who violate registration requirements.[39] Tools for amalgamating and publishing

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penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with [registration requirements]." 34 U.S.C. § 20913(e). Forty-nine states and the District of Columbia have met this requirement. Sex Offender Registration and Notification Act (SORNA) State and Territory Implementation Progress Check, *supra* note 9. Alaska, though it has not met the requirement to provide criminal penalties greater than a year, nonetheless prosecutes failure to register as a Class C felony under ALASKA STAT. § 11.56.835 (first degree) or a Class A misdemeanor under ALASKA STAT. § 11.56.840 (second degree). *See also* SORNA Substantial Implementation Review State of Alaska, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, Dep't of Justice, at 11 (Nov. 2015), https://www.smart.gov/pdfs/sorna/alaska-hny.pdf.

38. About NSOPW, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, Dep't of Justice, https://www.nsopw.gov/en/Home/About; *see also* 34 U.S.C. § 20921 (establishing the National Sex Offender Registry, "a national database . . . for each sex offender and any other person required to register in a jurisdiction's sex offender registry.").

39. *See* Operation FALCON, U.S. MARSHALS SERVICE, https://www.usmarshals.gov/falcon/; *see also* 34 U.S.C. § 20941(a) ("The Attorney General shall use the resources of Federal law enforcement, including the United States Marshals Service, to assist jurisdictions in locating and apprehending sex offenders who violate sex offender registration requirements.").

registries, and for combating registration violations, would remain in place.

In sum, those affected by the decision in this case present a low risk of re-offending, a high likelihood of being on state registries, or both. Invalidating Congressional delegation of power to the Attorney General in this case will not allow dangerous criminals to slide under the radar of registration requirements.

CONCLUSION

> Risk perception may not be about quantifiable risk so much as it is about immeasurable fear. Our fears are informed by history and economics, by social power and stigma, by myth and nightmares. And as with other strongly held beliefs, our fears are dear to us. When we encounter information that contradicts our beliefs, we tend to doubt the information, not ourselves.[40]

Those words, though written for another context, aptly describe the fear surrounding sex offenders. Registrants are painted with a broad brush, as confirmed criminals who will always be dangerous. But they are individuals whose experiences and character vary enormously. Most Pre-act offenders pose a low re-offense risk, often indistinguishable from the risk that nonsexual offenders

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40. Eula Biss, On Immunity: An Innoculation (2014), as quoted in Jerome Groopman, There's No Way Out of It!, New York Review of Books, Mar. 5, 2015, at 4, *available at* http://www.nybooks.com/articles/2015/03/05/vaccinate-or-not/.

will commit a sex offense. State policies will reasonably relieve a small group of them from a registration obligation. But most Pre-act offenders will continue to be covered by state registration schemes. Fears are not reality, and they should not be allowed to cloud the constitutional issues in this case.

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June 1, 2018

APPENDIX

APPENDIX

Amici are:

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Catherine L. Carpenter is The Honorable Arleigh M. Woods and William T. Woods Professor of Law, Southwestern Law School. She teaches and writes in the area of criminal law. For the last decade, Professor Carpenter's scholarship has focused primarily on the constitutionality of sex offender registration laws. Her work has been cited by courts and attorneys advocating for their clients.

Ira Ellman is Distinguished Affiliated Scholar, Center for the Study of Law and Society, University of California, Berkeley, and Affiliated Faculty of the Berkeley Center for Child and Youth Policy. He was Chief Reporter for the American Law Institute's major project, Principles of the Law of Family Dissolution. His empirical studies with social psychologists have focused on family policy. His 2015 article, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, has

been widely discussed in both legal publications and in key national media.

R. Karl Hanson, Ph.D., C.Psych., is one of the leading researchers in the field of risk assessment and treatment for individuals with a history of sexual offending. He has published more than 175 articles, including several highly influential reviews, and has contributed to the development of the most widely used risk assessment tools for individuals with a history of sexual offending (Static-99R; Static-2002R; STABLE-2007). Based in Ottawa, Canada, he worked for Public Safety Canada between 1991 and 2017, a federal department, and retired as Manager of Corrections Research. He is now adjunct faculty in the psychology departments of Carleton University (Ottawa) and Ryerson University (Toronto).

Eric Janus is a professor of law at Mitchell Hamline School of Law, former dean of William Mitchell College of Law, a scholar and expert in sex offender civil commitment laws, author of *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State*, and director of the Sex Offense Litigation and Policy Resource Center, established in 2017.

Richard A. Leo, Ph.D., J.D., is the Hamill Family Professor of Law and Psychology at the University of San Francisco School of Law. He is an expert on police interrogation practices, the impact of Miranda, psychological coercion, false confessions, and the wrongful conviction of the innocent. Dr. Leo has won numerous individual and career achievement awards for research

excellence and distinction, and in 2016, *The Wall Street Journal* named him as one of the 25 law professors most cited by appellate courts in the United States.

Chrysanthi Leon, J.D., Ph.D., is Associate Professor of Sociology and Criminal Justice at the University of Delaware. She received her J.D. and Ph.D. from the University of California, Berkeley. She is the author of *Sex Fiends, Perverts, and Pedophiles*: Understanding *Sex Crime Policy in America*, and co-editor of *Challenging Perspectives on Street-Based Sex Work.*

Jill S. Levenson, Ph.D., is a Professor of Social Work at Barry University in Miami, Florida. She studies the impact and effectiveness of social policies and therapeutic interventions designed to reduce sexual violence. She has published over 100 articles about sex offender management policies and clinical interventions, including projects funded by the National Institutes of Justice and the National Sexual Violence Resource Center.

Wayne A. Logan is Gary & Sallyn Pajcic Professor, Florida State University College of Law. Professor Logan is the author of *Knowledge as Power: Criminal Registration and Community Notification Laws in America* (Stanford University Press, 2009), cited by the U.S. Supreme Court in *United States v. Kebodeaux*, 570 U.S. 387 (2013), and co-editor (with J.J. Prescott) of *Sex Offender Registration and Community Notification Laws: An Empirical Evaluation* (Cambridge Univ. Press, under contract).

J.J. Prescott, Ph.D., J.D., is an economist and Professor of Law at the University of Michigan where he is co-director of the Empirical Legal Studies Center and the Program in Law and Economics. His recent research includes examination of the ramifications of post-release sex offender laws and the socio-economic consequences of criminal record expungement. The Sixth Circuit Court of Appeals relied upon his work in *Does #1–5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 55 (2017) in holding that portions of Michigan's sex offender registration law violated the *Ex Post Facto* clause.

Michael Seto, Ph.D., is the forensic research director of the Royal Ottawa Health Care Group. A clinical and forensic psychologist, he has presented and published extensively on the topics of pedophilia, sexual offending, online offending, and risk assessment. He is internationally recognized for this work and has authored two well-reviewed books on these topics published by the American Psychological Association, including his 2013 volume, *Internet Sex Offenders*.

Jonathan Simon, J.D., Ph.D., is the Adrian Kragen Professor of Law and Director of the Center for the Study of Law and Society at the University of California, Berkeley. His work focuses on the political dimensions of criminal law and crime policies.

Christopher Slobogin, J.D., LL.M. occupies the Milton Underwood Chair at Vanderbilt University School of Law. He is co-author of the leading casebook on mental health law and the best-selling treatise on the same

subject. He has written several articles about preventive detention of sex offenders and also addresses the topic in his Harvard University Press book, ***Minding Justice: Laws that Deprive People with Mental Disability of Life and Liberty.***

Richard Wollert, Ph.D., is a member of the Mental Health, Law, and Policy Institute at Simon Fraser University. An expert witness in many cases involving sexually violent predators, his publications critique sex offender recidivism risk assessments, DSM paraphilia diagnoses, and federal sentencing guidelines for child pornography. Dr. Wollert and his associates have treated over 5,000 sex offenders at his Oregon and Canadian clinics.

Franklin Zimring is the William G. Simon Professor of Law and Faculty Director, Criminal Justice Studies, at the University of California, Berkeley. He is known worldwide for his empirical work on criminal justice policy. Among his many books are ***Criminal Law and the Regulation of Vice***, and ***An American Travesty: Legal Responses to Adolescent Sexual Offending.***